119-148-70

UNITED STATES

M, 1886.

TRANSCRIPT OF

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 25.

JOHN J. SHIPMAN, APPELLANT,

VS.

THE DISTRICT OF COLUMBIA.

FILED AUGUST 22, 1883.

No. 157.

THE DISTRICT OF COLUMBIA, APPELLANT,

VS.

JOHN J. SHIPMAN.

FILED OCTOBER 12, 1883.

APPEALS FROM THE COURT OF CLAIMS.

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1 In the Court of Claims, December term, 1879.

JOHN J. SHIPMAN
vs.
THE DISTRICT OF COLUMBIA. } No. 122.

I. *Petition.—Filed November* 5, 1880.

The petition of John J. Shipman, of the county of Fairfax in the State of Virginia, respectfully showeth:

That he is a native-born citizen of the United States, now and for twenty-five years a resident of the county of Fairfax, Virginia, and his post-office address is Lewinsville, in said county.

That by the act of Congress, approved February 21, 1871, entitled, "An act to provide a Government for the District of Columbia" (section 1), the territory of the United States within the District of Columbia was created into a Government by the name of the District of Columbia, and constituted a body corporate for municipal purposes with power to contract and be contracted with, sue and be sued, plead and be impleaded, have a seal, and exercise all other powers of a municipal corporation.

By said act was also constituted a legislative assembly with powers extending to all rightful subjects of legislation within said District,
2 subject to the provisions of the act and to the Constitution of the United States, and to repeal or modification by the Congress of the United States.

By said act (section 37) was also constituted in said District a Board of Public Works which was thereby authorized to "have entire control of and make all regulations which they shall deem necessary for keeping in repair the streets, avenues, alleys, and sewers of the city, and all other works which may be intrusted to their charge by the legislative assembly or Congress."

By the act of July 10, 1871, of said legislative assembly, entitled "An act making appropriations for improvements and repairs in the District of Columbia and providing for the payment thereof" (section 1), a large sum of money was appropriated "for the improvement and repairs of the streets, avenues, alleys, and roads in the District of Columbia, and for the construction and repairs of sewers, bridges, and other public works therein, to be used and expended according to the provisions of the act of Congress aforesaid, and as fully as may be practicable and consistent with the public interest in conformity with the plan of improvement submitted to said legislature by the Board of Public Works of said District," and by said act, the said Board of Public Works was intrusted with the authority to carry out its provisions.

That on the 5th day of October, 1872, in pursuance of authority hereinbefore described and of negotiations previously had, a contract was awarded to your petitioner by the said Board of Public Works, as is shown by their letter of said date herewith filed and marked Exhibit No. 1.

That in pursuance thereof, your petitioner performed labor and services and furnished material for repaving the Canal Road from the Aqueduct Bridge to Chain Bridge under the order and *and* direction of the said Board of Public Works and its officers, for the use, purposes, and benefit of the said District of Columbia, to the amount and value of $30,000, or thereabouts.

That subsequently, on the 17th day of December, 1873, a *within* contract was entered into, numbered 561 and dated back to the 8th day of October, 1872, by the Board of Public Works of the first part, and your petitioner of the second part, whereby your petitioner agreed to furnish at his own proper cost and expense all the necessary materials and labor, and in a good, firm, and substantial manner to clean the gutters and do the grading necessary in trimming Canal Road between the bridge known as and called the Aqueduct Bridge over the Potomac River at Georgetown, D. C., and the so-called Chain Bridge over said Potomac River in the county of Washington, D. C.; also to construct and complete four (4) sewer-pipe culverts of fifteen (15) inch tile pipe thirty (30) feet long, with head walls of stone masonry, and one (1) sewer-pipe culvert of fifteen (15) inch tile pipe thirty-three (33) feet long, with head walls of stone masonry on said Canal Road between points aforesaid; also to construct and to complete one (1) sewer-pipe culvert of eighteen (18) inch tile pipe thirty-six (36) feet long, with head walls of stone masonry, and two (2) eighteen (18) inch pipe culverts thirty-three (33) feet long, with head walls of stone masonry on said
3 Canal Road between the points aforesaid; also to build and complete one (1) stone culvert twenty-seven (27) feet long, with a brick arch ten (10) feet span on the Canal Road over branch or water-course near Lock Mills; also to build and complete one (1) small stone culvert of about twenty (20) inches inside chamber on said Canal Road near Little Falls chapel in the county of Washington, D. C.; also to construct and complete four (4) eighteen (18) inch pipe culverts thirty (30) feet long, with head walls of stone masonry on said Canal Road between the points aforesaid; also to build and complete two (2) stone culverts twenty (20) inches span and thirty (30) feet long, with head walls of masonry on said Canal Road between the points aforesaid; also to do the necessary grading at and near the stone culvert with brick arch ten (10) feet span on said Canal Road over branch or water-course near Lock Mills, and to build and complete the stone masonry near said stone culvert aforesaid; also to lay and put down on said Canal Road between said Aqueduct Bridge over the Potomac River at Georgetown, D. C., and said bridge known as and called the Chain Bridge, over said Potomac River in the county of Washington, D. C., so much of m'cadam road as may be directed by the said party of the first part or its authorized officer or agent; also to make the necessary repairs of culvert numbered five (5) on profile in office of superintendent of roads in Canal Road and to build and complete the necessary stone retaining walls at said culvert.

All the work aforesaid to be done under the plans and to the entire satisfaction of the superintendent of roads of the party of the first part, and the work of said grading, pipe, culverts, and MacAdam paving to be done and completed in accordance with certain specifications named in said contract filed herewith as Exhibit No. 2, not deemed here more fully to state.

The said contract also contains the following provisions which only are deemed to be material and relevant to this claim:

"Second. It is further agreed that the said parties of the first part shall appoint from time to time such persons or person as may be by said parties deemed proper, to inspect the material to be furnished and the work to be done under this contract, and that such person or persons shall have any

and all opportunity and privileges which may be necessary to enable them to faithfully make the inspection aforesaid.

"Third. It is further agreed that the work under this contract shall be commenced immediately.

"Fourth. It is further agreed that the said parties of the first part may, on notice to the said party of the second part, suspend work under the contract; but if not suspended, it shall be completed as rapidly as possible from the date fixed for its commencement, and that said work shall not be built without the consent in writing of the said party of the first part, and that any subletting or assignment without such consent shall work a forfeiture of this contract.

"Eighth. And it is further agreed that partial payments shall be made by the duly authorized financial agent of the said party of the first part on monthly estimates of the chief engineer of the Board of Public
4 Works aforesaid, and that whenever the said chief engineer shall certify in writing that the party of the second part has completely performed this contract on his part, and shall submit with said certificate his estimate of the amount due the party of the second part, then within thirty days, as hereinafter provided, the said party of the second part shall be entitled to receive the full amount due under this contract, deducting therefrom all previous partial payments which may have been made as hereinafter mentioned.

"And it is further expressly agreed that no money shall become due and payable under this contract except upon the certificate of said engineer, as hereinbefore provided, and that the said party of the second part further agrees that he shall not be entitled to demand or receive payment for any portion of the aforesaid work except in the manner set forth in the agreement, and when each and all of the stipulations hereinbefore mentioned are complied with, and the engineer shall have given his certificate to that effect, a final settlement shall be made in writing between the parties, and the whole amount found due the party of the second part under the contract shall be paid to him, excepting such sums as may be retained under any provision of this contract; provided that partial payments may be made under direction of the said party of the first part otherwise than upon the estimates of the said engineer as provided above, if in the opinion of the said party of the first part the vigorous prosecution of the work will be promoted thereby.

"Tenth. It is further agreed that the said party of the second part shall receive the following prices as full compensation for furnishing all the materials and labor which may be required in the prosecution of the work to be done under this agreement, and in all respects completing the same to wit:

"Grading thirty (30) cents for each and every cubic yard of earth, sand, or gravel excavated and hauled a distance not exceeding two hundred (200) feet and one and a quarter ($1\frac{1}{4}$) cents per cubic yard for every additional one hundred (100) feet of haul beyond the first two hundred (200) feet.

"Laying fifteen (15) inch tile pipe, per lineal foot, one dollar and thirty-three ($1.33) cents.

"Laying eighteen (18) inch tile pipe, per lineal foot, one dollar and sixty-two ($1.62) cents.

"Excavations and refilling, forty (40) cents per cubic yard, to be measured in excavation only.

"Rock excavation where blasting is required, per cubic yard, one hundred (100) cents.

"For the cleaning of gutters and the grading in trimming road and for the grading and filling near stone culverts, per cubic yard, thirty (30) cents.

"Brick masonry, per thousand, twenty-two ($22.00) dollars.

"Rubble masonry laid in cement mortar, per cubic yard, five ($5) dollars.

"Laying m'cadam pavement, per square yard, twelve (12) inches deep, one dollar and fifty ($1.50) cents.

"Which said terms or prices the said party of the first part shall
5 pay to the said party of the second part as herein provided.

"Twelfth. It is further agreed that the measurements shall be made by the engineer of the said party of the first part, or his assistants.

"Thirteenth. And the said party, constituting and composing the Board of Public Works in and for the District of Columbia aforesaid, agree with the said party of the second part to perform all the stipulations of this contract obligatory in it, and to pay or cause to be paid to the said party of the second part or to his heirs, executors, or administrators in lawful money of the United States the amount which may be found from time to time due him according to the contract.

"Fourteenth. It is further agreed that the contract shall be subject to any and all provisions of an act entitled 'An act to provide a government for the District of Columbia,' approved February 21, 1871, so far as the same shall or may be in any respect applicable to said contract, and also to any law of the District of Columbia pertinent thereto, or to any part thereof as fully as if the same were set forth herein."

This contract was executed, the requisite bonds were given, and it was delivered on or about the 17th day of December, 1873.

By act of Congress of June 20, 1874, entitled "An act for the government of the District of Columbia, and for other purposes," and in virtue of its provisions (section 1), a commission was appointed consisting of three persons having power to exercise all the powers and authority then and before lawfully vested in the governor or Board of Public Works of said District, except as limited by said act, and having, among other things under said act, power to make contracts and incur such obligations as might be necessary to the faithful administration of the valid laws enacted for the government of the said District to the execution of existing legal obligations and contracts, and to the protection or preservation of improvements existing or commenced and not completed at the time of the passage of the act.

By said act (section 6) was also constituted a Board of Audit, consisting of the First Comptroller of the Treasury and the Second Comptroller of the Treasury of the United States, to examine and audit for settlement certain debts and claims existing against said District and the Board of Public Works, the kind and character of which are expressly enumerated in said act.

On the 17th day of April, 1874, a contract was executed between said Commissioners and your petitioner, styled an extension of contract No. 561, by which, under authority of the law aforesaid, it was agreed that contract No. 561 in the series of contracts made by the Board of Public Works be extended with its various terms, conditions, and stipulations, except as respects the time of execution, to embrace the work named therein, as ap-

pears by said extension of contract hereto annexed and filed as Exhibit No. 3, and which is as follows, to wit:

"Construct a stone retaining and parapet wall on the south side of the Little Falls Road between the Aqueduct and Chain Bridges or at such points along said road as may be authorized by the Commissioners at five ($5.00) dollars per cubic yard.

6 "Lay cobble-stone gutters or gutters of stone blocks of such size and quality as may be accepted by the engineer, in writing, in lieu of cobble-stone, on each side of the carriage-way along said road between the points mentioned, at sixty (60) cents per square yard.

"Also grading, macadamizing and connecting a road, which shall cross a private lot between the Little Falls Road and the Aqueduct Road, at the rates established and paid by the Board of Public Works for work of similar character. Provided the owner of said private lot shall convey to the District of Columbia the land required for said road without compensation therefor, and provided further that payment for the work herein mentioned shall be made in bonds issued by the sinking fund commissioners of the District of Columbia under and in virtue of section 7 of the act of Congress, approved June 20, 1874, which bonds shall be received and accepted at their par value."

That in pursuance of the aforesaid contracts made by said Board of Public Works and under their order and direction, the said petitioner furnished materials and performed labor and services, which were approved, received, and accepted by the proper officers of said District for the use, purposes, and benefit of said District of Columbia prior to the 14th day of March, 1876, to a large amount, of which was audited by the auditor of the Board of Public Works the sum of $22,595.75, and by the Board of Audit created by the said act of June 20, 1874, the sum of $93,997.91, amounting to the aggregate sum of $116,593.66 as shown by printed report of the Commissioners of the District for the year 1876, at pages 420, 421.

Under the extension of said contract, and in pursuance thereof, and under the order and direction of said Commissioners as aforesaid, the petitioner performed labor and services, and furnished materials to the amount of $118,583.01, which was audited by the said Board of Audit in respect to the work done and materials furnished under the extension of contract, as appears by said Commissioners' report, at pages 420, 421.

In addition to the work done and materials furnished, which has been audited as aforesaid, the petitioner furnished materials and performed the following labor and services under the direction of the Board of Public Works and in performance of contracts made with this Board, as stated, and no part of which has been audited or paid for, except that it was audited at $22,595.75, and there has been paid but $21,267.35, to wit:

33,232 cubic yards of haul, 1,650 feet over 200 feet, at .01¼ cents per hundred feet, =.20$^{62}/_{2}$ cents per cubic yard..	$6,854 10
Stone excavation, 1,661^{53} cubic yards of haul, as above, at .20$^{62}/_{2}$ cents per cubic yard.....	342 60
913^{39} cubic yards of stone masonry, audited at $5.00 per cubic yard, which should have been at $6.50, the Board rates, making a difference of	1,370 08
See certificate of B. D. Carpenter, engineer in charge, of date February 4, 1876, marked Exhibit No. 4.	
	$8,566 78

7 The following items, not embraced within either audit aforesaid, are for work and labor done and performed under the extension of contract aforesaid, and under the written orders and directions of the Commissioners of the said District, and actual superintendence of the engineers of the said District and to the satisfaction and acceptance of the Commissioners of the said District, to wit:

492 cubic yards coping, which should have been measured as stone masonry at $5.00 per cubic yard	$2,460 00
(See letter of petitioner of June 4, 1875, and answer of engineer thereto, of June 9, 1875, marked respectively, Exhibit Nos. 5 and 6, and extension of contract before described.)	
114 cubic yards of masonry, at $5 per cubic yard. See Exhibits No. 7, 8, and 9	570 00
Repairing road at above point	41 00
4,624 cubic yards of earth excavation necessary for foundation of retaining wall on canal road, at 40 cents per cub. yard	1,849 60
(See engineer's measurement, Exhibit No. 10.)	
4,528 cubic yards of broken stone necessary for drainage back of retaining walls, at $4.50 per cubic yard. See voucher of engineer's estimate, dated January 26, 1876, voucher No. 1134. Exhibit No. 11	20,376 60
Balance due on conduit road. This is for the difference between Board rates and the price actually received	325 67
Extra work under contract No. 561, as per order of R. L. Hoxie, engineer in charge, as per pay-rolls and vouchers furnished as per extra work. See Exhibit No. 12	6,682 20
120 cubic yards of cobble-stone used by overseer of repairs, at 75 cents per cubic yard	90 00
All the work performed and materials furnished above described were under aforesaid contracts and the written orders and directions aforesaid, and were accepted by the Board of Public Works and the Commissioners of said District for the use, purposes, and benefit of the said District of Columbia, and prior to the 14th day of March, 1876.	
The aggregate amount so claimed upon the work above described and which has not been audited or paid is	$40,961 85
The petitioner further says that of the amount of $22,595.75 audited by the auditor of the Board of Public Works, as appears at page 421 of the report of the Commissioners of 1876 aforesaid, there has never been paid to him but the sum of $21,267.28, leaving still due him on account of the amount so audited, the sum of	1,328 47
Making unpaid the sum of	$42,290 32

8 The petitioner further says, by the terms of the origial contract. No. 561, made with the Board of Public Works, under which work was done and materials furnished, and which was audited to the amount of $116,593.66, payment was agreed to be made in lawful money of the United States. Of this sum, there was paid only $3,000 in such money. The balance of what was paid was in evidences of indebtedness, as follows, to wit, certificates of the auditor of the Board of Public Works, amounting to $15,304.32; certificates of the board of audit, $96,960.77.

The petitioner used the utmost diligence in disposing of said certificates and in endeavoring to realize the highest value thereof, but was unable to realize therefrom more than seventy per cent. of the face value thereof, resulting in a loss to your petitioner of thirty per cent. of the amount of the certificates so received, and your petitioner claims to be paid such thirty per cent., amounting to the sum of $33,679.53.

The petitioner further says that the said defendant, in consideration of the work and labor above described and materials furnished, and moneys had and received for the use of said defendant, it promised pay to him so much money as he reasonably deserved to have therefor, and that he reasonably deserved to have therefor, and they were reasonably worth the sum of, $75,969.85 over and above what has been received by the petitioner as aforesaid.

And whereas also the said District of Columbia afterwards, to wit, on the 25th of January, 1876, was indebted to the said petitioner in the sum of $75,969.85, lawful money of the United States, for the work, labor, care, and diligence of the said petitioner, by him before that time done, performed, and bestowed on and about the business of the said defendant, and for said defendant at its special instance and request; and also in the further sum of $75,969.85, of like lawful money, for divers goods, wares, and merchandise, by the said petitioner before that time sold and delivered to the said defendant and at its special instance and request; also in the further sum of $75,969.85, of like lawful money, by the said petitioner before that time lent and advanced to, and paid out and expended for the defendant, and at its special instance and request; and also the further sum of $75,969.85, of like lawful money, for other money by the said defendant before that time had and received to and for the use of the said defendant; and being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on or about the 25th day of January, 1876, undertook and then and there promised the said petitioner to pay him the said several sums of money in this count mentioned when the said defendant should be thereunto afterwards requested. Nevertheless, the said defendant, not regarding its several promises and undertakings, hath not as yet paid the said several sums of money or any part thereof, to the said petitioner, although often requested so to do. But the said defendant to pay him the same hath hitherto wholly neglected and refused, and doth still neglect and refuse, to the damage of the said petitioner, and therefore he brings his suit.

9 The plaintiff demands judgment against the District of Columbia for $75,969.85, with interest from January 25, 1876.

The petitioner further says that, in consideration of his agreeing to advance money to assist in completing the work, the petitioner, on or about

the 9th day of October, 1874, agreed orally with William Fletcher, of Washington City, D. C., to give to him a certain per cent. of the net profits arising from such work by reason of which he will be entitled to receive a share out of the moneys which may be adjudged by this court when the same may be received by your petitioner; the extent of which interest is a matter of controversy between the petitioner and said Fletcher. No assignment or transfer of this claim or any part thereof, or interest therein, has been made, except as stated in this petition. Said petitioner is justly entitled to the amount therein claimed from the said District of Columbia, after allowing all just credits and offsets, and he and the said William Fletcher have at all times borne true allegiance to the Government of the United States, and neither have in any way aided, abetted, or given encouragement to rebellion against the said Government, and the petitioner believes the facts in said petition to be true.

JOHN J. SHIPMAN.
W. WILLOUGHBY,
Attorney for Petitioner.
ROBERT CHRISTY,
Of Counsel.

SOUTHERN DISTRICT OF OHIO, *ss:*

Subscribed and sworn before me, this 23d day of October, A. D. 1880. Witness my hand and official seal.

WILLIAM C. HOWARD. [SEAL.]
Clerk U. S. Circuit Court, S. D. O.

10 II. *Traverse.—Filed November* 12, 1880.

And now comes the Attorney-General, on behalf of the District of Columbia, and, answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

THOMAS SIMONS,
Ass't Att'y General.

III. *Motion for leave to amend petition and allowance of same.—May* 9, 1881.

And now comes the claimant and moves the court for an allowance of the annexed amendment to the petition, and that the same may be printed and filed with the original petition without a reprint being made of said original petition.

W. WILLOUGHBY,
Att'y for Claimant.

Allowed without prejudice to the rights of other parties.

W. A. RICHARDSON,
Judge, &c.

MAY, 9, 1881.

11 IV. *Amendment to petition.—Filed May* 10, 1881.

The petitioner, by leave of the court, amends his petition in this case as follows:

Claimant alleges that the intention of all the parties to the written agreement described in the petition as "Exhibit No. 2," as the time of execution thereof and of all parties connected therewith and with transactions growing out of the same, was to allow to the petitioner for the haul of earth, sand, gravel, and other material such rates as were established by the Board of Public Works under the same and allowed to contractors by the same in the District of Columbia and re-established and continued by the Commissioners of said District and which were known as "Board rates," which were, for every additional one hundred feet of haul beyond the first two hundred feet, one-half of one cent for each cubic yard prior to the first day of June, 1873, and one and one-fourth cents for each additional one hundred feet of haul beyond the first two hundred feet for every cubic yard subsequent to that time.

That by accident, inadvertence, mistake, or clerical error said written agreement failed to set forth said understanding and intention, but the same has at all times been acted upon by all parties connected therewith the same as though the same were therein expressed. Neither of the parties were aware of such omission until after the filing of the petition in this cause nor until after it was produced at the request of petitioner after the taking of depositions had been commenced, when it was for the first time discovered by petitioner.

Petitioner asks that said written agreement may be reformed so as to express the intention herein stated and that the allowance for haul may be made the same as though such intention were expressed, and for such other relief as may be just and equitable.

JOHN J. SHIPMAN.
W. WILLOUGHBY,
Attorney for Petitioner.

DISTRICT OF COLUMBIA, *to wit:*

John J. Shipman being sworn, says that he is the claimant described in the foregoing amendment to petition signed by him and that the statements therein contained are true to his knowledge except as to those stated upon information and belief, and as to those matters he believes them to be true.

JOHN. J. SHIPMAN.

Sworn to and subscribed before me this 9th day of May, A. D. 1881.
[SEAL.] JOHN RANDOLPH,
Ass't Clk C't of Claims.

12 V. *Plea of set-off.—Filed January* 25, 1882.

And now comes the Attorney-General on behalf of the District of Columbia, and for a further plea says:

That at and before the institution of this suit the claimant was and still is indebted unto the District of Columbia in the full and just sum of thirty thousand dollars ($30,000), for money had and received to the use of the defendant, and the said claimant being so indebted as aforesaid, in consid-

eration thereof promised to pay the defendant the said sum of money on request; yet the said claimant, although often requested so to do, hath not, nor hath any one in his behalf, as yet, paid the same sum or any part thereof, but hath wholly neglected and refused, and still neglects and refuses, so to do, which said sum, so due as aforesaid, the defendant claims to set off against the demand of the claimant, and thereupon he brings his counter-claim.

THOMAS SIMONS,
Ass't Attorney-General.

13 VI. *Replication to counter-claim.—Filed February* 23, 1882.

And now comes the claimant and objects to the plea of set-off or counter-claim filed herein, because it was not filed within the time prescribed by the rules of the court, and not until the claimant had closed his direct testimony in the cause, and further because it does not set forth the particulars of the demand.

And without waiving the said objections, he says that he is not indebted to the defendent as alleged in said counter-claim.

Wherefore he prays that the said counter-claim may be dismissed.

JOHN J. SHIPMAN,
W. WILLOUGHBY,
Att'y for Claimant.

DISTRICT OF COLUMBIA, *ss:*

Personally appeared before me, a notary public in and for the District aforesaid, John J. Shipman, to me personally known, who made oath in due form and according to law, that the statements made in the above replication are true to the best of his knowledge and belief.

Witness my hand and seal this 21st day of February, 1882.

[SEAL.] C. S. BUNDY,
Notary Public.

14 VII. *Bill of particulars of counter-claim.—Filed Dec.* 14, 1882.

To overpayment by mistake of fact, on account of stone masonry in canal wall in excess of amount required by contract, 4,091.83 cubic yards, at $5		$20,459 15
To overpayment on account of coping, amount paid in mistake of fact	$9,887 01	
Correct amount due	5,320 68	
Excess overpaid		4,566 33
To overpayment by mistake of fact for grading:		
Amount paid—		
For excavation	9,665 40	
For haul	7,893 41	
	17,588 81	
Amount properly due	782 88	
Excess overpaid		16,775 93

To overpayment on account of work on new cut road by mistake:

Amount of work done	$20,182 71	
Amount of payments on account	22,182 92	
Excess overpaid		$2,000 21
Total		43,801 62

THOMAS SIMONS,
Assistant Attorney-General.

6308.

15 VIII. *Amendment to petition and allowance of same.—Filed March 19, 1883.*

The petitioner, by way of amendment to the petition heretofore filed, says:

That in addition to the excavation heretofore claimed as having been made for foundation of retaining wall, he performed excavation for the purpose of constructing the lining in rear of said retaining wall to the amount of 5,000 cubic yards, for which, according to the terms of his said contract, No. 561, as extended, he was to receive forty cents per cubic yard, no part of which has been paid, and which was received and accepted by the Commissioners of the District for its use and benefit, and for which, in addition to the demand made in the original petition, he demands judgment against the District of Columbia for two thousand dollars ($2,000), with interest from January 25, 1876.

The petitioner says that no assignment or transfer of this claim, or any part thereof, or interest therein, has been made, except as stated in
16 the original petition, and that the claimant is justly entitled to the amount herein claimed in addition to that set forth in the original petition, from the District of Columbia, after allowing all just credits and offsets.

JOHN J. SHIPMAN.
W. WILLOUGHBY,
Att'y for Claimant.

Subscribed and sworn to before me this 16th day of March, A. D. 1883.
[SEAL.] JOHN RANDOLPH,
Ass't Clerk C't of Claims.

To the COURT OF CLAIMS:

And now comes the petitioner, John J. Shipman, and moves the court for leave to file the above amendment to his original petition in his said claim against the District of Columbia, No. 122, pending in said court.

W. WILLOUGHBY,
Att'y for Petitioner.

Allowed.

W. A. RICHARDSON,
Judge, &c.

MARCH 16, 1883.

17 IX. *Findings of fact and conclusions of law.—Filed April* 2, 1883.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I.

The following letters were addressed by the claimant to officers of the defendant at the time of their respective dates, and action was taken upon them by the Board of Public Works of the District of Columbia, as shown by the respective indorsements upon them:

GEORGETOWN, D. C., *Oct. 3d*, 1871.

Col. JAMES A. MAGRUDER:

SIR: I propose to grade, macadamize, culbert, and gutter the road from Georgetown to Little Falls or Chain Bridge at the following prices, viz: Grading, 18 cts. per sq. yd.; macadamizing, $1.35 per sq. y.; building three (3) large cubberts, which is necessary to be laid in best cement, with dressed stone faces at $5.00 per. sq. yd. and nine (9) small culberts, dry wall, at $25.00 apiece; laying and paving side gutter, wherever necessary, at 65 cts. per sq. yd.; $3.50 per perch for building up side wall near the canal wherever necessary.

In my opinion, it would be necessary to make the road eighteen (18) feet in width. If you award me the work, I have thirty men which I have been working on Chain Bridge for the last two months which I will move on the road forthwith.

Hoping that this my application will meet your favorable consideration, I am, with much respect, your obed't serv't,

JOHN J. SHIPMAN.

Direct, 122 Bridge st., Georgetown.

[Indorsements on above.]

No. 438 (B. of P. W., vol. 1). 1871.

GEORGETOWN, D. C., *Oct. 3d*, 1871.

Shipman, Jno. T., gives prices at which he will grade, macadamize, culvert, and gutter the road from Georgetown to Little Falls or Chain Bridge.

(In pencil:) File.

Board of Public Works, D. C., Oct. 13, 1871.

[Second indorsement.]

BOARD OF PUBLIC WORKS,
Washington, D. C., Oct. 13th, 1871.

Respectfully referred to the executive officer.

CHAS. S. JOHNSON,
Ass't Secretary.

WASHINGTON, D. C., *Dec. 7th*, 1871.

Mr. A. R. SHEPHERD,
V. P. B'd of Pub. Works:

SIR: Understanding that you considered the prices named in my proposal for macadamizing the Geo'town and Little Falls road, I wish to make some corrections.

The grading was intending to be by the cubic y'd instead of the sq. yd., as is the bid, and the macadamizing was bid for on the basis of being 12 inches deep, and the paving and guttering I will do for 50 cts. per sq. yd. if allowed to use blue-stone, or at Board prices if I am to use the cobble-stone.

18 I will further agree to do the work satisfactorily at a scale of prices agreed upon by the Board.

JOHN J. SHIPMAN.

[Inclosure in above.]

Shipman's proposal.

Macadamizing, $1.35 per sq. yd.; grading, 18 cts. per cubic yard; 9 dry stone culverts, $25 each; paving and guttering, 65c. per sq. yd.; for laying 3 large culverts, dressed stone faces, laid in cement, arches turned, $5 p'r sq. yd.

[Indorsement.]

No. 1869 (B. of P. W., vol. 1). 1871.

WASHINGTON, *D. C., Dec.* 7, 1871.

Shipman, Jno. J., makes correction in respect to the prices named in his proposal to macadamize the Georgetown and Little Falls road.

II.

On the 5th October, 1872, the said Board directed the chief engineer of the District to prepare with the claimant (who had then been a contractor engaged in Government and State contracts for many years) a contract for repairing the Chain Bridge road from Aqueduct to Chain Bridges, so as to put the same in good temporary repair for the winter, and caused an entry thereof to be made on their journal, and a further order that the claimant was to be notified of its action.

III.

On the same 5th day of October the assistant secretary of said Board addressed the following letter to the claimant:

BOARD OF PUBLIC WORKS, DISTRICT OF COLUMBIA,
Washington, Oct. 5th, 1872.

JNO. J. SHIPMAN, Esq.,
Washington, D. C.:

SIR: You have this day been awarded contract for repairing the Canal road from the Aqueduct Bridge to the Chain Bridge at Board rates.

The repairs will be made under the direction of B. D. Carpenter, supt. of roads, who has been notified to give you such instructions as you may require, so that the road may be put in good traveling condition before winter sets in.

By order of the Board.

CHAS. S. JOHNSON,
Ass't Secretary.

IV.

The claimant made no answer to the letter set forth in Finding III. He called upon the District engineer in charge of county roads, and after an interview with him, began work on the 8th October, 1872.

V.

On the 28th of the same October, the following letter was addressed to the claimant. It is disputed whether he received it. The court finds that he did receive it:

OCT. 28, '2.

JOHN J. SHIPMAN, Esq.,
Washington:

SIR: You are informed that the chief engineer has been directed 19 to amend your contract No 561, dated Oct. 8, 1872, so as to include the construction of a culvert on Canal road (culvert No. 6), at the following price, viz, according to plan, on file in this office:

83 cub. yds. culvert masonry, at $5.00		415 00
142 " " retaining walls, at 5.00		710 00
6,000 arch brick, " 22.00		132 00
1,533 cub. yds. grading, " .30		459 90
		$1,716 90

By order of the Board.

CHAS. S. JOHNSON,
Ass't Sec'y.

VI.

The claimant continued work until about December 1, 1872. On his request an estimate was made in January, 1873, of the amount of work done to that time. It was computed to be $4,740.77, and he received a certificate of $3,000 in part payment.

VII.

The following correspondence took place in April and May, 1873, with reference to resumption of the suspended work:

WASHINGTON, D. C., *April 10th*, 1873.

Hon. A. R. SHEPHERD,
Vice-Pres. B. P. W.:

SIR: The work under my contract on Canal road was suspended in Dec. last. I am now desirous of commencing said work and finishing up the same. If it is the pleasure of the Board to have it don', I have some 800 or 900 yds. of broken stone which was not included in my origenal contract. The use of this stone upon the bed of the road would add greatly to the durability of the same, being less likely to wash than clay or gravel, and altogether make a more permanent road. Should you determine to let me proceed with the work, I would like a permit to commence at once, as I have my men and teams ready. Therefore, should it be determined to

use the broken stone, I would request that my contract be amended so as to include the same at such prices as the Board has heretofore been paying for such work.

Very respectfully,

JOHN J. SHIPMAN.

Indorsed in pencil as follows:

Mr. Carpenter: I do not think there is any need of this. Is there?
A. R. S.

Inclosed in a wrapper on which are the following indorsements:

1.

No. 3310 (B. P. W., vol. 1), 1873.

WASH., D. C., *Apl.* 10, 1873.

Shipman, Jno. J., is desirous of commencing the work suspended on Canal road in Dec'r; would like a permit at once; his men and teams are ready; requests his contract amended so as to include 8 or 900 yds. broken stone at Board prices.

2.

(In pencil:) Mr. Carpenter: I do not think there is any need of this. Is there? C. L. B. Vol. 3, '73, p. 220, 221.

3.

BOARD OF PUBLIC WORKS, DISTRICT OF COLUMBIA,
Washington, April 26th 1873.

Respectfully referred to the supt. of roads. Mr. Shepherd thinks there is no need of this. Is there?

By order of the Board.

EDWARD JOHNSON,
Chief Clerk.

20 4.

MAY 6, 1873.

Respectfully returned with the report that an examination of this road has been made, and find it in a bad condition by reason of doing the work so late in the season. The stone work is not finished, which ought to be, especially as Shipman does the work for $5.00 per cub. yd. He commenced to finish the wall with very fine coping at the same rate as the other wall, and when completed will be an excellent job. The construction of two 18-in. pipe culverts is also necessary; they were included in his contract. The trimming of the road was not completed, and recommend it to be finished, especially between Chain Bridge and old guard lock in canal. In view of the large amount of travel over this road to Georgetown and Washington, I respectfully recommend the road be put in easy and comfortable condition. In regard to the m'cadamizing, if the Board do not wish to incur the extra cost of it that can be deferred until a more favorable opportunity.

Very respectfully,

B. D. CAPPENTER,
Supt. Roads.

5.

(In pencil:) Do the other. We won't do any macadamizing now.

IV.

The claimant made no answer to the letter set forth in Finding III. He called upon the District engineer in charge of county roads, and after an interview with him, began work on the 8th October, 1872.

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1,533 cub. yds. grading, " .30		459 90
		$1,716 90

By order of the Board.

CHAS. S. JOHNSON,
Ass't Sec'y.

VI.

The claimant continued work until about December 1, 1872. On his request an estimate was made in January, 1873, of the amount of work done to that time. It was computed to be $4,740.77, and he received a certificate of $3,000 in part payment.

VII.

The following correspondence took place in April and May, 1873, with reference to resumption of the suspended work:

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Hon. A. R. SHEPHERD,
Vice-Pres. B. P. W.:

SIR: The work under my contract on Canal road was suspended in Dec. last. I am now desirous of commencing said work and finishing up the same. If it is the pleasure of the Board to have it don', I have some 800 or 900 yds. of broken stone which was not included in my origenal contract. The use of this stone upon the bed of the road would add greatly to the durability of the same, being less likely to wash than clay or gravel, and altogether make a more permanent road. Should you determine to let me proceed with the work, I would like a permit to commence at once, as I have my men and teams ready. Therefore, should it be determined to

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Very respectfully,

JOHN J. SHIPMAN.

Indorsed in pencil as follows:

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2.

(In pencil:) Mr. Carpenter: I do not think there is any need of this. Is there? C. L. B. Vol. 3, '73, p. 220, 221.

3.

BOARD OF PUBLIC WORKS, DISTRICT OF COLUMBIA,
Washington, April 26th 1873.

Respectfully referred to the supt. of roads. Mr. Shepherd thinks there is no need of this. Is there?

By order of the Board.

EDWARD JOHNSON,
Chief Clerk.

20 4.

MAY 6, 1873.

Respectfully returned with the report that an examination of this road has been made, and find it in a bad condition by reason of doing the work so late in the season. The stone work is not finished, which ought to be, especially as Shipman does the work for $5.00 per cub. yd. He commenced to finish the wall with very fine coping at the same rate as the other wall, and when completed will be an excellent job. The construction of two 18-in. pipe culverts is also necessary; they were included in his contract. The trimming of the road was not completed, and recommend it to be finished, especially between Chain Bridge and old guard lock in canal. In view of the large amount of travel over this road to Georgetown and Washington, I respectfully recommend the road be put in easy and comfortable condition. In regard to the m'cadamizing, if the Board do not wish to incur the extra cost of it that can be deferred until a more favorable opportunity.

Very respectfully,

B. D. CAPPENTER,
Supt. Roads.

5.

(In pencil:) Do the other. We won't do any macadamizing now.

BOARD OF PUBLIC WORKS, DISTRICT OF COLUMBIA,
Washington, May 7, 1873.

B. D. CARPENTER, Esq.,
Sup't of Roads:

SIR: I am directed by the Board to say that your report upon the application of John J. Shipman to resume the work on the Canal road is approved, and you will have the work you suggest commenced. As for macadamizing, the Board will not do any of that at present.

Very respectfully,

EDWARD JOHNSON,
Chief Clerk.

Brief indorsed as follows:

Vol. 1, No. 261, supt. of roads. Washington, D. C., May 7th, 1873. Board of Public Works. Your report upon the application of John J. Chipman to resume the work on the Canal road is approved.

MAY 7, '3.

JOHN J. SHIPMAN, Esq.:

SIR: In reply to your communication of the 10th ultimo, asking permission to resume work on the Canal road, I am directed by the Board to notify you that the supt. of roads has been instructed in the matter, and from him you will receive the necessary orders.

Very respectfully,

EDWIN JOHNSON,
Chief Clerk.

VIII.

In pursuance of this correspondence the claimant called upon Carpenter and resumed the work under his instructions, and continued it until it was completed somewhere about the 24th October, 1873. Claimant then addressed the following letter to the defendant:

BOARD OF PUBLIC WORKS, DISTRICT OF COLUMBIA,
Washington, D. C., Oct. 24, 1873.

Hon. BOARD PUBLIC WORKS:

GENTLEMEN: Having completed the work on Canal road so far as the same has been ordered, I respectfully request a final measurement thereof.

Yours, &c.,

JNO. J. SHIPMAN.

Enclosed in a wrapper, upon which are the following endorsements:

21 No. 10731 (B. of P. W., vol. 4), 1873.

WASHINGTON, D. C., *Oct.* 24, 1873.

Shipman, Jno. J. Requests final measurement of work on Canal road.

BOARD OF PUBLIC WORKS, DISTRICT OF COLUMBIA,
Washington, Oct. 25, 1873.

Respectfully referred to B. D. Carpenter, supt. of roads.
By order of the Board:

FRANK T. HOWE,
Chief Clerk.

IX.

The defendant thereupon caused to be made the final measurement of the said work which the claimant had requested; on the said measurement a voucher was made up, which was in the following form, and the amount found due to thereon was paid to the claimant:

WASHINGTON, D. C., *Dec. 19th*, 1873.

Final measurement and estimate of work done on Canal road by J. J. Shipman to date.

30,258.8 cub. yds. grading on road,	at	30c.....	$9,077 64
1,312 " " " " gutter,	"	30c.....	393 60
1,661.53 " " rock excavation,	"	$1.00.....	1,661 53
931.39 " " stone masonry,	"	$5.00.....	4,566 95
5,700 brick for arch culvert,	"	$22.00.....	125 40
162 feet 18-inch pipe furnished & laid	"	1.62.....	262 44
129 " 15 " " " " " "		1.33.....	171 57
9 cub. yds. stone pavement for culvert,		$5.00.....	45 00
Deduct from meas. dated M'ch 2, '75:			
746.29 cub. yds. macadam stone furnished & laid,	at	$3.14...	2,343 35
555.55 " " " " " " " " "		1.50...	833 32
Total.....			19,480 80
10 %.....			1,948 08
			17,532 72
Property.....			836 54
			16,696 17
			13,771 43
			$2,924 74

Very respectfully,

B. D. CARPENTER,
Supt. Roads.

J. C. LAY, Esq., *Auditor.*

Endorsed as follows:

168 & 169. J. J. Shipman. Auditor for 2,924.74 work on Canal road. Cont. No. 561, 1872. Road, 2,924.74. Prop't'y, 836.55. Retain, 1,948.08.

Received certificates Nos. 168 & 169, dated Jan'y 9th, 1874, for $2,924.74.

JOHN J. SHIPMAN.

X.

Claim for haul.

The material for the grading and the rock excavation paid for in accordance with the measurements contained in the final measurement and

estimate set forth in voucher IX, amounting in the aggregate to 33,232 yards, was hauled an average distance of 1,850 feet.

22 On the 22d January, 1872, the Board rates for hauling were one cent per cubic yard for each 200 feet over the first 200 feet. On the 15th July, 1873, the rate was changed to 1¼ cents per cubic yard for every 100 feet of haul over the first 200 feet after June 1, 1873.

When the measurement was made, as set forth in Finding IX, and when the payments were made thereunder, the claimant laid no claim to be paid for such hauling, nor did he lay claim to be paid therefor until after the performance of all the work hereinafter set forth and the final measurement and the final payment set forth in Finding XXVI.

The claimant then demanded payment for the haul. The defendant refusing, the demand for it forms the first and second items in the bill of particulars in his petition. The 1,661.53 cubic yards of haul of stone excavation in said second item are included in and go to make a part of the 33,232 cubic yards of haul which form the said first item, and the separate claim therefor was abandoned by the claimant at the trial.

XI.

Board rates for masonry.

On the 29th March, 1872, the Board of Public Works adopted as Board rates for rubble masony laid in cement mortar $6.50 per perch.

The claimant rendered his accounts for the 913.39 cubic yards of stone masonry described in the final measurement, set forth in Finding IX, at $5 per cubic yard. The accounts were audited and he was paid therefor at that rate, and laid no claim to any other or further compensation therefor until after the final settlement set forth in Finding XXVI. Then the claimant demanded payment for said masonry at Board rates, and the demand being refused, such claim forms the third item in said bill of particulars.

XII.

The claimant being dissatisfied with the allowance of the charge for m'cadam in the measurement set forth in Finding IX, the following correspondence took place:

BOARD OF PUBLIC WORKS, DISTRICT OF COLUMBIA,
Washington, Nov. 26, 1873.

Col. JAS. A. MAGRUDER:

SIR: My contract for the improvement of Canal road has been completed; the macadam for the same is not included in the contract, that having been ordered by you personally. I respectfully request that you officially indorse upon this paper that said macadam was put on said road by your order, so as to enable me to have my account for the same closed up.

Very respectfully,

JNO. J. SHIPMAN.

Endorsed as follows:

I did order the stone put on the road.

JAMES A. MAGRUDER,
Tr. B'd P. W'ks.

Nov. 29,'73.

Amend the contract to include what was ordered by Col. Magruder as above.

H. A. W.

(Stamped:) Board of Public Works, D. C., Nov. 29, 1873.

Enclosed in a wrapper upon which is the following endorsement:

23 No. 12515 (B. of P. W., vol. 4), 1873.

WASHINGTON, D. C., *Nov.* 26, 1873.

Shipman, J. J. Requests his contract for impt. of Canal road amended so as to include macadamizing same as ordered by Col. Magruder. See within. C. L. B., vol. 1073, p. 799, 800.

BOARD OF PUBLIC WORKS, DISTRICT OF COLUMBIA,
Washington, Nov. 29th, 1873.

Hon. ADOLF CLUSS, *Eng'r in charge:*

SIR: You will please cause contract No. 561, with J. J. Shipman, to be amended so as to include the m'cadamizing of the Canal road, the work having already been done.

By order of the Board.

CHAS. S. JOHNSON,
Secretary.

Between Georgetown Aqueduct Bridge and Chain Bridge.

(Endorsed as follows:) No. 1641. L. R. contracts, 1873. B. P. W., Washington, D. C., Nov. 29, 1873. Chas. S. Johnson, sec't'y. Directs the contract clerk to amend con. # 561, with J. J. Shipman, so as to include the m'cadamizing of Canal road. Bureau of contracts. Received Dec. 2, 1873. 2104. Nov. 29th, 1873. B. P. W. Amend cont. # 561 with J. J. Shipman. Referred to conct. clerk Nott.

BOARD OF PUBLIC WORKS, DISTRICT OF COLUMBIA,
Washington, Nov. 29th, 1873.

J. J. SHIPMAN, Esq., *City.*

SIR: The engineer in charge has been directed to amend your contract, No. 561, so as to include the m'cadamizing of the Canal road, the work having already been done.

By order of the Board.

CHAS. S. JOHNSON,
Secretary.

XIII.*

In pursuance of the order of the Board referred to in Finding II, the deputy engineer of the Board directed the contract clerk of the Board to prepare a contract with the claimant. No such contract was actually signed until about December, 1873, when the following instrument was signed by the persons whose names it bears:

No. 561.

W. A. C.
See F. No. 894.
" " " 950.
" " " 1641.

This contract, made and concluded this eighth day of October, in the year one thousand eight hundred and seventy-two, by and between Henry

D. Cooke, Alexander R. Shepherd, James A. Magruder, A. B. Mullett, and S. P. Brown, constituting and composing the Board of Public Works of the District of Columbia, of the first part, and John J. Shipman, of Lewinsville, Va., of the second part, witnesseth:

First. That the said party of the second part has agreed, and by these presents doth agree, with the said party of the first part, for the consideration hereinafter mentioned and contained, and under the penalty expressed in a bond bearing even date with these presents, and hereunto annexed, to furnish at his own proper cost and expense all the necessary materials and labor, and in a good, firm, and substantial manner to clean the gutters and do the grading necessary in trimming Canal road, between the bridge known as and called the Aqueduct Bridge, over the Potomac River at Georgetown, D. C., and the so-called Chain Bridge, over said Potomac River, in the county of Washington, D. C.

Also to construct and complete four (4) sewer-pipe culverts, of fifteen (15″) inch tile pipe, thirty (30′) feet long, with head walls of stone masonry, and one (1) sewer-pipe culvert of fifteen (15″) inch tile pipe, thirty-three (33′) feet long, with head walls of stone masonry, on said Canal road, between the points aforesaid.

24 Also to construct and complete one sewer-pipe culvert, of eighteen (18″) inch tile pipe, thirty-six (36′) feet long, with head walls of stone masonry, and two (2) eighteen (18″) inch pipe culverts, thirty-three (33′) feet long, with head walls of stone masonry, on said canal road, between the points aforesaid.

Also to build and complete one (1) stone culvert, twenty-seven (27′) feet long, with brick arch ten (10′) feet span, on said Canal road, over branch or water-course near Lock Mills.

Also to build and complete one (1) small stone culvert, of about twenty (20″) inches inside diameter, on said Canal road, near Little Falls chapel, in county of Washington, D. C.

Also to construct and complete four (4) eighteen (18″) inch pipe culverts, thirty (30′) feet long, with head walls of stone masonry, on said Canal road, between the points aforesaid; also to build and complete two (2) stone culverts, twenty (20″) inches span and thirty (30′) feet long, with head walls of stone masonry, on said Canal road, between the points aforesaid.

Also to do the necessary grading at and near the stone culvert, with brick arch ten (10) feet span on said Canal road over branch or water-course near Lock Mills, and to build and complete the stone retaining walls near said stone culvert aforesaid.

Also to lay and put down on said Canal road, between said Aqueduct Bridge, over the Potomac River at Georgetown, D. C., and said bridge known as and called the Chain Bridge, over said Potomac River, in the county of Washington, D. C., so much of macadam road as may be directed by the said party of the first part or its duly authorized officer or agent.

Also to make the necessary repairs of culvert (numbered five (5) on profile in office of superintendent of roads) on said Canal road, and to build and complete the necessary stone retaining walls at said culvert.

All of the work aforesaid to be done under the plans and to the entire satisfaction of the superintendent of roads of the said party of the first

part, and the work of said grading, pipe culverts, and macadam paving to be done and completed in accordance with the specifications following, to wit:

BOARD OF PUBLIC WORKS, DISTRICT OF COLUMBIA.

Specifications for constructing roadway of m'cadam metal.

(1) The road will be dressed to the proper grade and cross-section to (12) twelve inches below the surface of the street when finished.

(2) The surface will be well compacted by rolling and ramming. Any mud or soft or compressible material in the road-bed will be removed and the space filled with clean earth or gravel.

(3) On this bed the metal will be spread in a uniform layer of (8) eight inches. The whole will then be compacted by rolling and ramming in such places as the roller cannot reach.

(4) This base course of metal will be of broken stone, of any hard and firm stone which may be approved by the engineer. This stone will be broken to pass through a ring (3) three inches in diameter by its longest dimensions, and screened from all dirt and particles less than one-quarter of an inch wide.

(5) On this base course will be spread the top course of metal (4) four inches thick, made from hard and compact stone. Granite, trap, or equally hard stone will be required for this top course. No sandstone, mica, slate, or any stone which contains mica will be used.

(6) The stone for this course will be screened and entirely freed from dust and the finer particles of stone. This course will be well compacted by rolling. On this course will be spread the top dressing obtained from the screening of the top course in sufficient quantity to be half ($\frac{1}{2}$) an inch thick after filling the surface void spaces of the top course.

(7) Draining pipe-drains will be laid wherever required, and connected with the man-holes of the sewers. They will be paid for by the linear foot, at a price to be determined by the Board.

BOARD OF PUBLIC WORKS, DISTRICT OF COLUMBIA.

Specifications of grading streets, etc.

The base of excavation, including the sidewalks, will be ——— feet wide. The road-bed proper will be ——— feet between curbs, and must be graded to ——— (——) inches below the level of the curb at the centre of the street, and ——— (——) inches below the level of the curb at the side, leaving the road-bed a fall of ——— inches from the centre to the side.

25 The material obtained in grading will be deposited where directed by the chief engineer of the Board of Public Works; and no sand, gravel, cobble-stones, curb, bricks, or pipe obtained in the excavation, or found on the premises, shall be considered the property of the party of the second part, nor used by him nor them, except as hereinafter prescribed.

The filling must be done in layers not exceeding (18) inches in thickness, so that the same may be well compressed by the driving of the carts over it.

The excavation will include only the road-bed, sidewalks, and the slope from them to the building line, according to the grade to be given by the chief engineer of the Board of Public Works.

No more grading must be commenced at any one time than one square, except by permission of the chief engineer; and the filling must be brought up to grade established and shown by plans before the work can be accepted as completed.

In the allowance for hauling, the length of the haul over two hundred (200) feet and the amount of material hauled, will be determined on an average basis by the chief engineer of the Board of Public Works, whose decision shall be final. All materials, such as curb, cobble, brick, &c., removed from the premises and deposited under the directions of the chief engineer, will be paid for at the rates for hauling established by the Board of Public Works.

All measurements will be made in the excavation only.

BOARD OF PUBLIC WORKS, DISTRICT OF COLUMBIA.

Specifications for brick masonry and sewers.

(1) All the materials furnished and all the work done, which, in the opinion of said Board of Public Works, shall not be in accordance with this specification, shall be immediately removed and other materials furnished, and work done that will be in accordance therewith.

(2) In the construction of the brick masonry none but the best quality of whole brick, burnt hard entirely through, free from cracks, and with true, smooth faces, shall be used, and which are to be thoroughly wet immediately before being laid. Every brick is required to have full cement joints under bottom sides and ends, which for each brick is to be formed at one (1) operation, and in no case is it to be made by working in the cement after the brick is laid; every other course of brick to be laid with a line. The bricks to be culled as they are brought upon the ground, and all bricks of an improper quality, and all bats, immediately removed from the same. The cement mortar is to be composed of the best quality of fresh hydraulic cement, mixed in the proportion of one barrel of cement (of 300 pounds) to two (2) barrels, not packed, of clean, sharp, silicious sand, free from loam.

(3) The work under this agreement is to be prosecuted at and from as many different points in such part or parts of the streets and avenues on the line of the work as the said Board may from time to time, during the progress of the work, determine, at each of which points an inspector will be placed to supervise the same, whether such work be connected with the sewer, with the receiving basins, or with the culverts.

(4) The sewers and culverts to be of circular vitrified Scotch stone-wart sewer-pipe, or pipe equal thereto, of the dimensions shown on the plan of the work, which will be furnished to the contractor by the said Board at their yards. There will be:

* * * * * * *

The joints to be properly fitted with bands or sleeves, and wiped or pointed, inside and outside, with cement mortar as the pipes are laid. If necessary (which the engineer in charge of the work will determine) the

sewer-pipes and culverts will be firmly supported at each side of the joints by a foundation plank, two (2) inches thick, six (6) inches wide, and two (2) feet long, laid under and transversely with the line of *for* the pipes, for which plank, as well as for the plank used in the foundation for the brick sewer, there will be allowed and paid a sum per thousand feet b. m. to be determined by the Board. The refilling of the trench under and on each side of the pipes when laid, and to a height of at least one (1) foot above the outer surface of the same, will be of earth or sand, entirely free from stone or rubbish, thoroughly compacted by ramming, with tools made for this purpose, in layers of not more than four (4) inches, as the filling progresses. The remainder of the trench is to be refilled and rammed as provided in specification 15. Lateral spurs, for six (6) inch house-connections, are to be laid in front of each building on the line of the work, at such points as said Board may designate; and where buildings are not erected they will be laid at such points as the Board may direct. The spurs are to be securely closed with approved vitrified-ware covers.

(5) The sewers are to be built of the dimension, with the connections on the lines, and at the depths shown on plans or furnished by
26 the engineer. The connections with present sewers to be made in a workmanlike manner. All curves to have each a radius of not less than thirty (30) feet. The ends of all sewers (except at their discharge) to be securely closed with brick masonry or approved stone-ware covers.

(6) Brick manholes, to be worked at such places in the line of the sewer as the engineer may direct, according to the plans furnished by the engineer. A cast-iron manhole head and cover, free from imperfections and thoroughly cleaned, and in dimensions, weight, and quality of iron, and in all respects similar to the pattern to be furnished by the engineer—similar to those now in use in Washington—is to be fitted to each of the above-described manholes.

(7) Receiving basins are to be built where shown on the plan of the work, or at such other place or places and at such time as the Board may, during the progress of the work, from time to time determine. The basins to be on the circular corners or side of the street, as the said engineer shall direct, and to be constructed in accordance with the drawings to be seen at the office of said engineer; each portion of the basins to be of the size and material designated on drawings. The weight, size, and shape of the covers of the receiving basins to be similar to the pattern now in the office of the said engineer. The whole to be laid in cement, and the joints to be struck on the whole of the inner sides. In case the nature of the ground be such that, in the opinion of the said engineer, timber ought to be substituted for the stone foundation, as shown on the said model, the timber shall be furnished and the foundation built of the proper thickness and size, without additional charge, by the said contractor.

(8) The culverts for the connection of the receiving basins are to be constructed of the same material as the pipe sewers, and laid in like manner.

(9) NEW SEWERS AND HOUSE CONNECTIONS.—The said Board shall have the right to connect any sewer or sewers with the sewer herein described, or to grant permits to any person or persons to make house connections therewith at any time before it is finally completed; and said contractor shall not interfere with or place obstructions in the way of such

persons as may be employed in building such new sewer or sewers, or in making such connections; no extra allowance will be made to the aforesaid contractor on account thereof.

(10) REBUILDING OF CULVERTS AND HOUSE CONNECTIONS.—In case the line of this sewer shall intersect with any culverts now built, so much of said culverts, as in the opinion of said Board may be necessary, shall be taken up and rebuilt to and connected on a proper curve with said sewer. In case the lines of the proposed work shall intersect with any sewer connections for which permits may have been previously granted by said Board, the same shall be extended to and reconnected with new work as it progresses, in the manner and of the materials allowed by said Board under their rules and regulations relative to sewer connections.

(11) OF PASSAGEWAYS AND RAIL-TRACKS.—All the paving and macadamization stones necessary to be removed, together with all rock, earth, or sand taken from the trenches, shall be placed in such parts of the carriageway, or the vicinity thereof, as the inspector in charge of the work shall direct, and in all cases a passageway on the sidewalks of not less than three (3) feet in width shall be preserved free from all obstructions. In the progress of the work the contractor will be required to preserve from needless obstruction the carriageway on one side of the line of the proposed work, and also to afford the necessary facilities to the company or companies owning rail-tracks on the line of the work, or to their agents, in their preservation of the same from injury, either by removal or otherwise, without extra charge therefor. In case it be necessary to remove the said tracks, or any portion thereof, the said company or companies will be notified by the Board to remove the same within a specified time, and the contractor shall not interfere with the said tracks, or any portion thereof, until the expiration of the time specified in said notice.

(12) The trenches, except where fast rock may be encountered, to be at least ten (10) inches on each side wider than the outer width of the masonry; in rock excavation the trenches to be excavated to the width allowed in the measurement of rock excavation. In no case shall the trench be opened more than one hundred (100) feet in advance of the complete building of the sewer, unless permission in writing so to do shall have been given by said engineer. In all cases of rock blasting the ordinance, laws, and regulations relative to rock blasting to be strictly observed, and the material so excavated to be immediately removed from the street. Where a line of main water pipes intersects the line of the trench, the rock necessary to be excavated, for a width of five (5) feet in the clear on each side of the main pipe, is in all cases to be removed without blasting.

(13) Sheet piling to be used where the same may be necessary, but no allowance will be made therefor. In all cases the sheet piling is to be drawn as the work progresses unless ordered otherwise by the said Board, in which case the sheet piling so ordered to be left in the trench will be measured and allowed for at the same rate as the foundation plank.

(14) The refilling in all cases shall be either earth, gravel, or sand, of wholesome quality, and in case of deficiency in the earth or sand
27 taken from the trenches, the contractor shall furnish a sufficient quantity of sand or gravel to properly fill the trenches without extra charge. In refilling the earth or sand to be well and faithfully rammed in layers of not more than nine (9) inches as the work progresses.

(15) REGRADING AND REPAVING.—The carriageway on the line of the work to be regraded and repaved or remacademized, as the case may be, to the extent which the aforesaid work may render necessary. The said contractor will be required to reset all curb, gutter, bridge, and flag stones which may have been displaced during the prosecution of the work under this agreement; and in case any of said stones shall have been broken, in consequence of any act or omission on the part of the said contractor or his agents, new stones, to be approved by said Board, shall be furnished and set in place thereof by said contractor, at his own expense, prior to the acceptance by said Board of the work aforesaid as completed.

(16) In repaving, the paving stones, for a width of not less than sixteen (16) feet over and adjoining the line of the sewer, shall be taken up and bedded endwise in good, clean gravel, twelve (12) inches in depth, in a good and workmanlike manner. The repavement, after it has been examined and approved of by the engineer, to be covered with pure sand one (1) inch in thickness, and no more. Twelve (12) days after the completion of the whole work the covering sand shall be swept into heaps and removed from the street; and until this be done, and the certificate of the engineer to the effect that the stipulations relative to the removal of all surplus materials, earth, sand, and rubbish from the line of the work have been complied with, shall have been obtained and filed in the office of said Board, the work will not be considered as completed according to this agreement. In remacadamizing or repaving the same will be done in accordance with the work of the street before the sewer was commenced.

(17) All the cross-gutters which may become unnecessary in consequence of the construction of any receiving bases under this agreement are to be taken up, and the whole of the intersections between the cross-walks regraded in conformity with the grade of the street, and repaved in the manner before described.

(18) ENGINEER'S CERTIFICATE.—The whole of the regrading and repaving or remacadamizing is to be done to the satisfaction of the engineer (which shall be determined by a certificate to that effect, signed by him and filed in the office of the Board), and the same kept in good repair for a period of six (6) months from the date of the last said certificate.

(19) CLEANING UP, &C.—The basins and culverts to be thoroughly cleaned out and left clean. Upon the completion of the work embraced in this agreement, a certificate, signed by the engineer, to the effect that the stipulations relative to the removal of all surplus materials, earth, sand, rock, and rubbish from the line of the work have been faithfully complied with, will be filed in the office of the board.

(20) ALL IRON, WATER, AND GAS PIPES which it becomes necessary to remove shall be considered as the property of the Board, and left in such part of the street as the inspector may direct, unless notice to the contrary is given by the Board in writing to the said contractor, in which case the same shall be removed or otherwise disposed of at the expense of said contractor.

(21) ALL LOSS OR DAMAGE arising out of the nature of the work to be done under this agreement, or from any unforseen or unusual obstructions or difficulties which may be encountered in the prosecution of the same, or from the action of the elements, will be sustained by the contractor.

(22) IN MEASURING ROCK EXCAVATIONS a width of four (4) feet at a

point six (6) inches below the outer bottom of the brick and pipe sewers and culverts will be allowed; from this point a slope of three (3) inches to one (1) foot on each side of the excavation will be allowed until the surface of the rock is reached, and no more.

(23) SUSPENSION OF MASONRY DURING WINTER.—All work in masonry to cease positively on the first day of December, in each year, and not to be resumed until such time next thereafter as shall be designated by the Board. Upon the suspension of mason-work, as before mentioned, the trenches to be refilled and repaved, or remacadamized, as the case may be, and all materials, surplus earth, sand, rock, and rubbish removed from the street immediately thereafter. The inspectors will be retained on the work until the same shall be so done, and receive pay in the same manner as if the work was in progress, which shall be charged to the contractor for the time the work may be unnecessarily delayed.

(24) CONNECTIONS NOT TO BE MADE WITHOUT PERMISSION.—The work aforesaid will not be considered as completed in accordance with this agreement, and therefore will not be received, in case any connections or drains are made and joined therewith without permission in writing being obtained from the Board prior to the commencement of the construction of such connections or drains.

(25) Wherever the word "Board," or "Board of Public Works," and pronouns in place thereof, are used in this contract, they are to be considered as referring to the party of the first part to this contract.

(26.) Wherever the word "engineer" or "engineers," or the pro-
28 nouns referring thereto, are used in this contract, they are intended to designate the chief engineer of said Board and the assistant acting under him.

(27) Wherever the word "contractor" and the words "party of the second part," and the pronouns in place thereof, are used in this contract they are to be considered as referring to and meaning the party or parties (as the case may be) of the second part to this agreement.

(28) And the said party of the second part hereby further agrees that the said parties of the first part shall be, and they are hereby, authorized to retain, out of the moneys payable to the said party of the second part under this agreement, the certain sum of ten (10) cents for each lineal foot of sewer constructed under this agreement, and to expend the same in the manner hereinafter provided for in making such repairs to the carriageway on the line of said sewer as the said Board may deem necessary.

(29) And it is further agreed that if, at any time during the period of six (6) months from the date of the final completion of the sewer aforesaid, the carriageway on the line of the same shall, in the opinion of the said Board, require regrading and repaving, or remacadamizing, and the said Board shall notify the said party of the second part to make the repairs so required; and if the said party of the second part shall neglect to make such repairs to the satisfaction of the said Board within twenty-four (24) hours from the date of the service of such notice, that then the said Board shall have the right to employ such other person or persons as they may deem proper to make the same, and to pay the expenses thereof out of the said certain sum retained for that purpose by the said parties of the first part, as before mentioned.

(30) And the said party of the second part further agrees that he will

purchase and receive from the said Board the whole of the sewer and culvert pipes required for the construction of the work herein described, and that he will not sell or otherwise dispose of the said pipes, or any of them so purchased by him, but will use the same exclusively in the construction of the work last aforesaid. He further agrees that he will pay for the said pipes, at the price established by the Board for the same, in current funds, at the time or times they may be ordered by him; and he further agrees that he will be at all charges for loading said pipes at the yards of the said Board, and of hauling the same to the line of the proposed work.

(31) And the parties of the first part hereby agree, upon the expiration of the said period of six (6) months, provided that the said carriageway shall at that time be in good order, which fact shall be determined by a certificate to that effect, signed by the superintendent of the appropriate bureau, to pay to the said party of the second part the whole or such part of the sum last aforesaid as may remain after the expenses of making the said repairs in the manner aforesaid shall have been paid therefrom.

(32) And the said party of the second part hereby covenants and agrees that he will not sell, or permit to be removed from the line of the work before the trench shall have been refilled, any building sand or earth thrown up, except upon the written permission of said Board, and then only so much as shall remain after reserving a sufficient quantity to refill the trench and complete the paving; but that he will in all cases refill the trench with the same materials thrown out, provided it be good sand, gravel, or earth. But if it be unsuitable, consisting of rock, blasting-stones, or mud, that then the same shall be removed from the ground, and good, clean earth procured and used for refilling the trench, and sand of proper quality and depth spread on the surface to receive the repavement.

Second. It is further agreed that the said party of the first part shall appoint, from time to time, such persons or person as may be by said party deemed proper to inspect the material to be furnished and the work to be done under this contract, and that such persons or person shall have any and all opportunity and privileges which may be necessary to enable them to faithfully make the inspection aforesaid.

Third. It is further agreed that the work under this contract shall be commenced immediately.

Fourth. It is further agreed that the said party of the first part may, on notice to the said party of the second part, suspend work under this contract; but if not suspended it shall be completed as rapidly as possible from the date fixed for its commencement, and that the said work shall not be sublet without the consent in writing of the said party of the first part, and that any subletting or assignment, without such consent shall work a forfeiture of this contract.

Fifth. It is further agreed that if, at any time, the party of the first part shall be of opinion that the said work, or any part thereof, is unnecessarily delayed, or that the said contractor is wilfully violating any of the conditions or covenants of this contract, or is executing the same in bad faith, all of the work may be discontinued under the contract, or any part thereof; and the said party of the first part shall thereupon have the power to place such and so many persons as may be deemed advisable, by contract or otherwise, to work at and complete the work herein described, or any part thereof, and to use such materials as may be found upon the

line of said work, or to procure other materials for the completion
29 of the same, and to charge the expense of said labor and materials to the said party of the second part, and the expense so charged shall be deducted and paid by the said party of the first part out of such moneys as may be then due, or may at any time thereafter grow due to the said party of the second part, under and by virtue of this agreement, or any part thereof, and in case such expense is less than the sum which would have been payable under this contract if the same had been completed, the said party of the second part shall be entitled to receive the difference; and in case such expense shall exceed the last said sum the amount of such excess shall be paid to the said party of the first part by the said party of the second part.

Sixth. It is further agreed that all loss or damage arising out of the nature of the work to be done under this agreement, or from any unforeseen obstructions or difficulties which may be encountered in the prosecution of the same, or from the action of the elements, or from incumbrances or injuries to individuals, property, or otherwise, on the line of the work or adjacent thereto, shall be sustained by the said contractor; and the said contractor hereby agrees, in the execution of the said work, as aforesaid, to keep at all times the said work properly guarded or protected, so as to prevent all injuries to persons, travellers, animals, or property; and in the event of any such injury or injuries occurring in consequence of the insufficient guarding or protection of said work, as aforesaid, the said party of the first part shall retain, out of any money or moneys due, or to become due, said contractor, a sum sufficient to cover all damages arising out of said injury or injuries until the same may be settled at law or otherwise.

Seventh. It is further agreed that the said party of the second part shall punctually pay the workmen who shall be employed by him on work under this contract in cash current, and not in what is denominated store pay or orders; and that he will, from time to time, and as often as may be required by said party of the first part, furnish to said party satisfactory evidence that all persons who have done work or furnished materials have been paid as herein required; and if such evidence is not furnished such sum or sums as may be necessary for such payment or claims shall be retained by said party of the first part until the said claims shall be fully satisfied.

Eighth. And it is further agreed that partial payments shall be made by the duly authorized financial agent of the said party of the first part on the monthly estimates of the chief engineer of the Board of Public Works aforesaid, and that whenever the said chief engineer aforesaid shall certify, in writing, that the party of the second part has completely performed this contract on his part, and shall submit, with said certificate, his estimate of the amount due the party of the second part, then, within thirty (30) days, as hereinafter provided, the party of the second part shall be entitled to receive the full amount due under this contract, deducting therefrom all previous partial payments which may have been made as hereinafter mentioned.

And it is further expressly agreed that no money shall become due and payable under this contract except upon the certificate of said engineer, as hereinbefore provided; and the said party of the second part further agrees that he shall not be entitled to demand or receive payment for any

portion of the aforesaid work except in the manner set forth in this agreement; and when each and all of the stipulations hereinbefore mentioned are complied with, and the engineer shall have given his certificate to that effect, a final settlement shall be made in writing between the parties, and the whole amount found due the party of the second part under this contract shall be paid to him, excepting such sum or sums as may be retained under any provision of this contract; provided that partial payments may be made, under direction of the said party of the first part, otherwise than upon the estimates of the said engineer, as provided above, if, in the opinion of the said party of the first part, the vigorous prosecution of the work will be promoted thereby.

Ninth. It is further agreed that if, at any time during the period of one (1) year from the completion of the work to be done under this contract, any part or parts thereof shall become defective from imperfect or improper material or construction, and in the opinion of the said party of the first part require repair, the said party of the second part will, on being notified thereof, immediately commence and complete the same to the satisfaction of the said party of the first part; and in case of a failure or neglect of the said party of the second part so to do, the same shall be done under the directions and orders of the said party of the first part at the cost and expense of the said party of the second part.

Tenth. It is further agreed that the said party of the second part shall receive the following prices as full compensation for furnishing all the materials and labor which may be required in the prosecution of the whole of the work to be done under this agreement, and in all respects completing the same, to wit:

Grading, thirty (30) cents for each and every cubic yard of earth, sand, or gravel excavated and hauled a distance not exceeding ——— (——) feet, and ——— (——) cent per cubic yard for every additional ——— (——) feet of haul beyond the first ——— (——) feet.

* * * * * * *

30 Laying fifteen-inch (15″) tile pipe, per lineal foot, one dollar and thirty-three ($1.33) cents.

Laying eighteen-inch (18″) tile pipe, per lineal foot, one dollar and sixty-two ($1.62) cents.

* * * * * * *

Excavations and refilling, forty (40) cents per cubic yard, to be measured in excavation only.

Rock excavation, where blasting is required, per cubic yard, one hundred (100) cents.

For the cleaning of gutters and the grading in trimming road, and for the grading and filling near stone culverts, per cubic yard, thirty (30) cents.

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Brick masonry, per thousand, twenty-two, $22.00.

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Rubble masonry, laid in cement mortar, per cubic yard, five, $5.00.

* * * * * * *

Laying macadam pavement, per square yard, twelve (12″) inch deep, one dollar and fifty ($1.50) cents.

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Which said sums or prices the said party of the first part shall pay to the said party of the second part as herein provided.

Eleventh. And it is further agreed that should any litigation arise in any way connected with the work embraced, as aforesaid, in this contract, from or by reason of any demand or demands, claim or claims, by any person or persons, to use within the said District of Columbia the improvement or pavement or pavements contracted for herein to be laid and put down by the said party of the second part, under or by reason of any patent, or assignment of patent, either in the form of rovalty or damages, or in any otherwise, the said party of the second part will indemnify and save harmless the party of the first part from all said demand or demands, claim or claims, whether arising out of suits or otherwise; and the said party of the first part may, at its option, retain from the amount or amounts due, or to become due, under this contract to the said party of the second part, a sum or sums necessary or sufficient to satisfy or liquidate all of said demands or claims, as aforesaid, until they shall be amicably adjusted or finally determined at law.

Twelfth. It is further agreed that the measurements shall be made by the engineer of the said party of the first part or his assistants.

Thirteenth. And the said party constituting and composing the Board of Public Works in and for the District of Columbia aforesaid agree with the said party of the second part to perform all the stipulations of this contract obligatory in it, and to pay or cause to be paid to the said party of the second part, or to his heirs, executors, or administrators, in lawful money of the United States, the amount which may be found, from time to time, due him according to the contract.

Fourteenth. It is further agreed that this contract shall be subject to any and all provisions of an act entitled "An act to provide a government for the District of Columbia," approved February 21, 1871, so far as the same shall or may be in any respect applicable to said contract, and also to any law of the District of Columbia pertinent thereto, or to any part thereof, as fully as if the same were particularly set forth herein.

In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first above written.

H. D. COOKE, [L. S.]
ALEX. R. SHEPHERD, [L. S.]
JAMES A. MAGRUDER, [L. S.]
Board of Public Works of the District of Columbia.
JOHN J. SHIPMAN, *Contractors.*

Signed and sealed in presence of—
WM. E. NOTT.
J. T. SETTLE.
JOHN A. HURLEY.

Know all men by these presents that we, John J. Shipman, of Lewinsville, Va., of the District of Columbia, are held firmly bound unto Henry D. Cooke, Alexander R. Shepherd, James A. Magruder, A. B. Mullet, and Samuel P. Brown, constituing and composing the Board of Public Works of the District of Columbia, in the sum of five thousand ($5,000.00) dollars, lawful money of the United States of America, to be paid to *siad*

Henry D. Cooke, Alexander R. Shepherd, James A. Magruder, A.
31 B. Mullett, and Samuel P. Brown, constituting and composing the Board of Public Works of the District of Columbia, or to the certain attorney, successor, or assigns thereof, for which payment, well and truly made, we and each of us do bind ourselves, and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals. Dated this eighth day of October, A. D. one thousand eight hundred and seventy-two.

Whereas the above bounden John J. Shipman, by an instrument in writing under his hand and seal, bearing even date with these presents, has contracted with Henry D. Cooke, Alexander R. Shepherd, James A. Magruder, A. B. Mullett, and Samuel P. Brown, constituting and composing the Board of Public Works of the District of Columbia, to clean the gutters, do the necessary grading and trimming on said road, and to build, construct, and complete pipe and stone culverts of the character and dimensions specified in foregoing contract, with head walls of stone masonry, and to build and complete stone retaining walls on Canal road between the points named in foregoing contract.

Also to lay and put down on said Canal road, between the Aqueduct Bridge over the Potomac River at Georgetown, D. C., the bridge known as and called the Chain Bridge over said Potomac River, in the county of Washington, D. C., so much of macadam road as may be directed by the said party of the first part, or its duly authorized officer or agent, as fully described in foregoing contract, and on the conditions and for the considerations in the aforesaid contract mentioned and contained or referred to therein.

Now, therefore, the condition of the above obligation is such that if the said John J. Shipman shall well and truly and in a good, sufficient, and in a workmanlike manner execute the work mentioned in said contract, and complete the same in accordance with the stipulations thereof, and in each and every respect fully comply with the provisions and requirements therein contained, then this obligation to be void; otherwise to remain in full force and virtue.

JOHN J. SHIPMAN. [L. S.]
WM. FLETCHER. [L. S.]
JNO. F. MURRAY. [L. S.]

Signed and sealed in presence of—
WM. E. NOTT.
J. T. SETTLE.

Bondsmen's oaths.

DISTRICT OF COLUMBIA,
County of Washington, ss:

I, Wm. Fletcher, being duly sworn, depose and say that I reside in the city of Washington, in the District of Columbia; that I am a freeholder therein; and that the value of my real estate, over and above all debts and liabilities, is over five thousand dollars ($5,000.00), and that I am fully responsible for the amount of my obligation, the foregoing bond by me executed.

WM. FLETCHER.

Sworn and subscribed this 17th day of Dec., 1873, before me.
[SEAL.] WM. E. NOTT,
Notary Public.

DISTRICT OF COLUMBIA,
County of Washington, ss:

I, Jno. F. Murray, being duly sworn, depose and say that I reside in the city of Washington, in the District of Columbia; that I am a freeholder therein; and that the value of my real estate, over and above all debts and liabilities, is over five thousand dollars ($5,000.00), and that I am fully responsible for the amount of my obligation in the foregoing bond by me executed.

JNO. F. MURRAY.

Sworn and subscribed this 17th day of Dec., 1873, before me.
[SEAL.] WM. E. NOTT,
Notary Public.

(Indorsed:) D. C. No. 1. E. A. F. Brady, U. S. C.

XIV.

At the time when the claimant's said work was begun, and when
32 said contract was ordered by the Board to be prepared, H. D. Cooke, Alexander R. Shepherd, and James A. Magruder were members of the Board of Public Works. Before December, 1873, Cooke had ceased to be a member. Both the claimant and the Board of Public Works treated this instrument as a valid contract, and intended to embody in it all the agreements of the parties under which the work had been done, including the agreement about the macadam, and antedated it for the purpose of giving it force and validity from the day of its alleged date.

XV.

After the change in the form of government in the District the claimant, on the 9th day of July, 1874, addressed a letter to the Commissioners of the District. The said letter and the several indorsements upon it were as follows:

WASHINGTON, D. C., *July* 9, 1874.

To the Hon. COMMISSIONERS OF THE DISTRICT OF COLUMBIA:

GENTLEMEN: Contract No. 561 was awarded me by the late Board of Public Works of the District of Columbia for grading, culverting, and macadamizing of the Canal road, beginning at Aqueduct Bridge, in Georgetown, and running along said canal to the Chain Bridge.

About two-thirds of the grading, culvert, and walls, according to the specifications in said contract, have been completed, but only about 1,300 feet of the macadamizing had been done when said work, on account of the lateness of the season (fall of 1873), was suspended by order of the late Board of Public Works until such time as the weather would permit of its completion.

Under the new law of Congress creating the new government for this District it is there stated that contracts which were awarded by the late Board of Public Works, but not completed, shall be finished up.

In pursuance of said law, I respectfully request that the executive officer of the District government be authorized to make an immediate inspection of said road and of the work so far completed under said contract, and that

he be empowered to issue to me an official order for the immediate completion of said contract.

This road being of great importance to the cities of Washington, Georgetown, and the country—it being the only free artery leading into said cities from Virginia—its early completion is a great necessity, being an United States road.

Very respectfully, your most ob'd't serv't,

JOHN J. SHIPMAN,
822 19*th st. N. W.*

[Indorsements on above.]

No. 26, vol. 1. 1874.

WASHINGTON, D. C., *July 9th*, 1874.

Shipman, John J., # 822 19th st. N. W.

Con'ct # 561 was awarded him by B. P. W. for imp'v't of Canal road, from Aqueduct Bridge, in Geo't'n, to Chain Bridge, in Geo't'n, to Chain Bridge. Work is partially done. Wishes the work inspected, and order issued directing him to finish the work.

[Second indorsement.]

OFFICE OF ENG. OF COMMISSION,
DISTRICT OF COLUMBIA,
Washington, July 13, 1874.

Respectfully referred to auditing commission of Dist. of Col.
By order of eng.

FRANK T. HOWE,
Chief Clerk.

[Third indorsement.]

JULY 29, 1874.

Respectfully referred to the engineer.
By order of Comm'rs.

WM. TINDALL,
Secretary.

33 [Fourth indorsement.]

26. Eng. off. A. 1874. 951 co. 1874.

OFFICE OF THE BOARD OF AUDIT,
July 28, 1874.

Respectfully returned to the Commissioners. From the statement of Mr. Shipman it would appear that for the work done under his contract the accounts were audited, and certificates issued by the auditor of the B. P. W. for the amount due, less the percentage reserved under the contract, and that the material request is for authority to go on and complete his contract.

E. G. CHURCH,
For Board of Audit.

XVI.

On the 17th day of July, 1874, the claimant addressed the following letter to the chief engineer of the District:

WASHINGTON, D. C., *July 17th*, 1874.

Lieut. R. L. HOXIE,
Chief Eng'r, D. C.:

DEAR SIR: Having noticed in the Baltimore Sun of this morning that "such work as is necessary will be continued," I have the honor to state that it is urgent that my work on Canal road from Aqueduct to Chain Bridge should be completed as soon as possible, in order to preserve what has already been done; being newly graded it is liable to wash and be cut up, so as to render it impassable during the winter months. There are a number of large bowlders to be removed and repairs to be made where the Gov't laid a water main. As the completion of this work is of the greatest necessity in order to accommodate the heavy travel over it, I desire you will give the subject your earliest consideration, and to communicate to me your determination.

Very respectfully,

JOHN J. SHIPMAN,
No. 822 19*th Street NW.*

[Endorsements on above.]

No. 369 (engineer's office, vol. A), 1874.

WASHINGTON, D. C., *July 17th*, 1864.

Shipman, John, J., # 822 19th st. NW., req. an early decision relative to his con'ct for imp'v't of Canal road from Aqueduct to Chain Bridge.

(In pencil:) C. File for action. Cont. 561.

[Second endorsement.]

Referred in engineer's office to Mr. Oertley for preliminary survey and measurement.

XVII.

The following replies, dated, respectively, October 1, 1874, October 5, 1874, and March 12, 1875, were made to the letters set forth in Findings XIV and XV:

ENGINEER'S OFFICE, DISTRICT OF COLUMBIA,
Washington, Oct. 1st, 1874.

J. J. SHIPMAN, Esq.,
19*th st., bet. I & Pa. ave. NW.:*

SIR: The order suspending work upon your contract No. 561 having been revoked, you are hereby authorized to proceed with the work as soon as the grade is given. You will apply for grade at once.

Very respectfully,

R. L. HOXIE,
Lt. Engineers, U. S. A., Engineer of D. C.

34

ENGINEER'S OFFICE, DISTRICT OF COLUMBIA,
Washington, Oct. 5th, 1874.

JOHN J. SHIPMAN, Esq.,
Arlington Hotel:

SIR: You are hereby authorized to proceed at once with the work under your contract No. 561, the grades of which will be furnished in a few days.

By order of the engineer.

FRANK J. S. HOWE,
Chief Clerk.

ENGINEER'S OFFICE, DISTRICT OF COLUMBIA,
Washington, March 12th, 1875.

JOHN J. SHIPMAN, Esq.:

SIR: You are requested to take measures at once for the vigorous prosecution of the work under your contract, No. 561, of the late Board of Public Works. All instructions which may have been given you restraining work on account of the weather are hereby revoked, and you are notified that a strict construction will be given to the terms of your contract respecting the time within which the work should be completed.

Your attention is invited to the conditions of the 5th section of your contract, which will be enforced.

Very respectfully,

R. L. HOXIE,
Lieut. Eng'rs, U. S. A., Eng'r of D. C.

XVIII.

Under this extension of the claimant's contract, which had now become known to both parties as contract 561, a large amount of work was done which has been paid for, and is not in controversy.

The last item in the claimant's bill of particulars in his original petition, to wit, the claim of $1,328.47 for an alleged difference between the amount awarded him by the Board of Audit and the amount paid him by the defendant, is claimed for work done during this period. The court finds that there is no proof to support such a claim during this period or at any other time.

XIX.

On the 5th of January, 1875, many citizens petitioned the District government to have work resumed on the Canal road. The claimant on the 11th of the same January addressed the following letter to the Board of Commissioners:

WASHINGTON, D. C., *January 11th*, 1875.

Hon. BOARD OF COMMISSIONERS:

GENTLEMEN: I propose to furnish material and build the wall on the Little Falls road between the Aqueduct and Chain Bridge, as contem-

plated in my contract, No. 561, to be laid with lime and cement properly mixed, at the following price, to the satisfaction of the engineer in charge:

For the wall, p'r cubic yard $5 00
For stone gutters, if necessary, p'r sq. yd..... 60

Very respectfully,

JOHN J. SHIPMAN.

Endorsed as follows: "6458, 1875, C. O., #192. E. O., 1875. Jan'y 11th, 1875. Shipman, John J., proposes to furnish the material and build the wall on the Little Falls road, between the Aqueduct and Chain Bridge, as contemplated under his contract, No. 561. 8852, C. S. B., vol. 4, '75, p. 87. Order-book, vol. 2, p. 420. Respectfully referred to the engineer D. C. By order Wm. Tindall, sec'y. Jan'y 11th, 1875. Referred in engineer's office to Mr. Bodfish for plan and estimate in 3.65 bonds. Mr. Brown draw contract."

Memorandum in pencil, as follows: "Brown make up expense."

35 XX.

The Commissioners referred this letter to the engineer of the District, who, on the 2d of April, 1875, made the following report thereon:

ENGINEER'S OFFICE, DISTRICT OF COLUMBIA,
Washington, April 2nd, 1875.

To the honorable the Commissioners of the District of Col.:

GENTLEMEN: I have the honor to return herewith the proposition of John J. Shipman to build retaining walls on Little Falls road under the provisions of his contract, No. 561, of the late Board of Public Works. I have carefully examined the line of this work, with a view to the erection of a retaining and parapet wall on the side of the canal, and am strongly impressed with the necessity for the work. As it will be difficult to arrive at a correct estimate of the cost until the work has progressed somewhat, I recommend that the contract be extended so as to include the building of this wall at such points as may be indicated hereafter, and the construction of the gutters. I propose, then, to construct, say, five hundred (500) feet of the wall, and the Commissioners can be governed by the relation of cost to advantage derived in deciding whether the work shall be continued. It is work that must be done at some time or other, and the present is as favorable as any. I have arranged terms with the contractors which are highly advantageous to the District. The extension should embrace also the grading and macadamizing of a short connection with Aqueduct roads which will connect the latter (a macadamized road) with the city and open a fine drive to the reservoir. This connection crosses a private lot, which the owner has consented to relinquish without charge. I think it best to take advantage of the offer at once.

Very respectfully,

R. L. HOXIE,
Lieut. Engineers, U. S. A., Engineer of D. C.

Endorsed as follows: "#195, E. O., 1875. No. 8852, 1875. Office of Commissioner, D. C., April 2nd, 1875. Engineer D. C. Hoxie, R. L. Returns the proposition of John J. Shipman to build retaining walls on

Little Falls road, under the provisions of his contract, No. 561, with the late B. P. W., and submits report relative thereto, 6458."

Memorandum in pencil, as follows: "Notify Shipman. Brown draw cont."

OFFICE OF THE COMMISSIONERS OF THE
DISTRICT OF COLUMBIA,
Washington, April 3rd, 1875.

Respectfully returned, approved.
By order.

WM. TINDALL, *Sec'y.*

XXI.

In accordance with the pencil memorandum on said report of April 2, the following letter was on the 8th April addressed by the said engineer to the claimant:

ENGINEER'S OFFICE, DISTRICT OF COLUMBIA,
Washington, April 8th, 1875.

JOHN J. SHIPMAN, Esq., *City:*

SIR: You are requested to call at this office and execute the necessary papers for an extension to your contract, No. 561, with the late Board of Public Works, embracing the following-named work, viz: To construct a stone retaining and parapet wall on the south side of the Little Falls road, between Aqueduct and Chain Bridges, or at such points along said road as may be authorized by the Commissioners, at $5.00 per cubic yard; to lay cobble-stone gutters along said road, between points above mentioned, at 60c. per square yard, and the grading and macadamizing a connecting road, which crosses a private lot, between the Little Falls road and the Aqueduct road, at Board rates, provided the owner of said private lot conveys to the District government the land required for said road, without compensation therefor; provided further that payment for the work herein mentioned be accepted in 3.65 bonds at par.

Very respectfully,

R. L. HOXIE,
Lieut. Engineers, U. S. A., Engineer of D. C.

36 XXII.

On the 17th April, 1875, the Commissioners of the District and the claimant entered into the following contract to extend the provisions of contract No. 561 to the proposed new work:

Extension of contract No. 561.

APRIL 17, 1875.

It is agreed by and between the Commissioners of the District of Columbia and John J. Shipman that contract No. 561, in the series of contracts made by the Board of Public Works of the District of Columbia be, and the same is hereby, extended, with its various terms, conditions, and stipulations (except as respects the time of execution), to embrace the following work, to wit:

Construct a stone retaining and parapet wall on the south side of the

Little Falls road between the Aqueduct and Chain Bridges, or at such points along said road as may be authorized by the Commissioners at five dollars ($5.00) per cubic yard; lay cobble-stone gutters, or gutters of stone blocks of such size and quality as may be accepted by the engineer in writing in lieu of cobble-stone, on each side of the carriageway along said road between the points mentioned, at sixty cents (60c.) per square yard.

Also grading and macadamizing a connecting road which shall cross a private lot between the Little Falls road and the Aqueduct road, at the rates established and paid by the Board of Public Works for work of similar character, provided the owner of said private lot shall convey to the District of Columbia the land required for said road without compensation therefor; and provided further, that payment for the work herein mentioned shall be made in the bonds issued by the sinking-fund commissioners of the District of Columbia under and by virtue of section 7 of the act of Congress approved June 20, 1874, which bonds shall be received and accepted at their par value.

It is further agreed that all of the work contemplated by this agreement shall be performed in strict accordance with the specifications hereunto annexed.

Specifications for retaining and parapet walls on Canal road.

First. The present retaining walls to be removed to such depth from the top as may be directed, and the foundation inspected and approved by the engineer of the District of Columbia before relaying the wall, which is to be done in cement mortar.

Second. Only so much of the stone obtained from the old wall to be reused *or* will be declared fit for reuse by the engineer, the balance must be furnished by the contractor.

Third. The stock furnished must be sound, of good beds, and at least one-fourth ($\frac{1}{4}$) of all the stones must not contain less than five (5) cubic feet nor be of less thickness than six (6) inches. All discolored stones, and all stones showing disintegrations of any kind, or from wear, the outside faces of the quarry, will be rejected.

Fourth. The wall will be laid with a batter on the front fall of one (1) to twelve (12), and the lower beds will be prepared by leveling the top of that part of the old wall which is left, the interstices being flushed with mortar and spawls, the thickness of the walls to be $\frac{4}{10}$ of its height.

Fifth. The cement mortar to be composed of two parts of sharp, clean sand, and one part of fresh cement, the cement to be Rosendale, or of the best grade of Shepherdstown, or Round Top cement, and must be to the satisfaction of the engineer.

Sixth. The stones must be laid in a good, workmanlike manner, well bonded, the interstices well and fully flushed with mortar and spawls, and a lining of coarse gravel twelve (12″) inches in thickness, carried up in rear of the retaining wall.

PARAPET WALL.

Seventh. On the above retaining wall a parapet wall, with a coping, is to be built two (2′) feet thick at base, two (2′) feet three (3″) inches high

to bed of coping, and one (1′) foot six (6″) inches thick at top; the coping to consist of selected stones six (6′) to ten (10″) inches thick, jointed; in length of not less than two (2) feet, and must project over the parapet wall not less than two (2″) nor more than four (4″) inches on each side, and must be so disposed along the line of the wall that no two (2) in juxtaposition shall vary in thickness nor in width more than three-quarters ($\frac{3}{4}$) of an inch. The stock must be as required under the head three (3),
except that one-fourth ($\frac{1}{4}$) of the stones shall not contain less than
37 four (4) cubic feet nor be of less thickness than six (6) inches;
the mortar to be the same as described under head five (5), except that half and half lime and cement may be used. The jointing of the coping, however, must be done in pure cement mortar. The reference of the top of the retaining wall will be the same as the edge of the gutter.

GUTTERS

to be laid of selected cobble-stones of suitable size, or stone blocks of such size and quality as may be accepted by the engineer, in writing, in lieu of cobble-stone, on each side of the carriageway, as indicated on the cross-section herewith attached. The outer gutter to be three (3′) feet wide, and the inner, which shall follow as nearly as may be the inner edge of the available space for a roadway, to be four (4′) feet wide, and arranged with drops and grates as shown on the plan herewith attached, and the reference of the inner edge thereof to be fixed one-fifteenth ($\frac{1}{15}$) of its distance from the axis of the macadamized roadway below the crown of the same.

No additional allowance will be made for grading of this portion of the roadway; the refuse material from the quarries may be used for the purpose.

In witness whereof the said District of Columbia has caused this instrument be signed by the Commissioners of said District, appointed under the act of Congress entitled "An act for the government of the District of Columbia, and for other purposes," approved June 20, 1874, and the common seal of said District to be hereunto affixed, and the party of the second part to these presents has hereunto set his hand and seal, this seventeenth day of April, 1875.

W. DENNISON, [L. S.]
J. H. KETCHAM, [L. S.]
S. L. PHELPS, [L. S.]
Commissioners of the District of Columbia.
JOHN J. SHIPMAN, [SEAL.]
Contractor.

Signed and sealed in the presence of—
WM. A. BROWN.
JOHN A. HURLEY.

Know all men by these presents that we, John J. Shipman, Owen O'Hare, and Wm. Fletcher, of the District of Columbia, are held and firmly bound unto the District of Columbia, in the sum of fifty thousand ($50,000.00) dollars, lawful money of the United States of America, to be paid to the said District of Columbia, or to the certain attorney, successor, or assigns thereof; for which payment, well and truly to be made, we and each of us do bind ourselves, and each of our heirs, executors, and

administrators, jointly and severally, firmly by these presents. Sealed with our seals, dated this 17 day of April, A. D. one thousand eight hundred and seventy-five.

Whereas the above-bounden John J. Shipman, by an instrument in writing under his hand and seal, bearing even date with these presents, has contracted with the District of Columbia to construct a stone retaining and parapet wall on the south side of Little Falls road, between Aqueduct and Chain Bridges, lay cobble-stone gutters along the same, and construct a connecting road between the Little Falls road and Aqueduct road, as will more fully appear by reference to the foregoing contract, on the conditions and for the considerations in the aforesaid contract mentioned and contained or referred to therein:

Now, therefore, the condition of the above obligation is such that if the said John J. Shipman shall well and truly and in a good and sufficient manner execute the same in accordance with the stipulations of said contract, and in every respect fully comply with the provisions and requirements therein contained, then this obligation to be void; otherwise to remain in full force and virtue.

JOHN J. SHIPMAN. [L. S.]
O. O'HARE. [L. S.]
WM. FLETCHER. [L. S.]

Signed and sealed in the presence of—
WM. A. BROWN.
JOHN A. HURLEY.

Bondsmen's oaths.

DISTRICT OF COLUMBIA,
County of Washington, ss:

I, Owen O'Hare, being duly sworn, depose and say that I reside in the city of Washington, in the District of Columbia; that I am freeholder therein, and that the value of my real estate, over and above all
38 debts and liabilities, is over twenty-five thousand dollars ($25,000), and that I am fully responsible for the amount of my obligation in the foregoing bond by me executed.

O. O'HARE.

Sworn and subscribed this 17th day of April, before me.
[SEAL.] ARTHUR SHEPHERD,
Notary Public.

DISTRICT OF COLUMBIA,
County of Washington, ss:

I, William Fletcher, being duly sworn, depose and say that I reside in the city of Washington, in the District of Columbia; that I am a freeholder therein, and that the value of my real estate, over and above all debts and liabilities, is over twenty-five thousand dollars ($25,000), and that I am fully responsible for the amount of my obligation in the foregoing bond by me executed.

WM. FLETCHER.

Sworn and subscribed this 17th day of April, before me.
[SEAL.] ARTHUR SHEPHERD,
Notary Public.

XXII.

On the 20th April and the 22d May, respectively, the engineer of the District addressed the following letters to the claimant:

ENGINEER'S OFFICE, DISTRICT OF COLUMBIA,
Washington, April 20th, 1875.

J. J. SHIPMAN, Esq., *City:*

SIR: You are hereby authorized to construct 500 feet of retaining and parapet wall on the south side of the Little Falls road, in accordance with the terms of the extension of your contract, No. 561, with the late Board of Public works, and in strict conformity with the accompanying plan.

Very respectfully,

R. L. HOXIE,
Lieut. Engineers, U. S. A., Engineer of D. C.

ENGINEER'S OFFICE, DISTRICT OF COLUMBIA,
Washington, May 22d, 1875.

JNO. J. SHIPMAN, Esq., *City:*

SIR: You will continue the retaining and parapet wall throughout the line of your work, and will conform to the following instructions:

The old wall will be removed down to the level of the water in the canal. If at this reference the old wall continues to offer a substantial foundation the new wall will be built upon it.

Wherever the old wall does not extend below this depth, or is not of a suitable character for a foundation, the building of the new wall must be omitted until the drawing off of the water in the canal will permit the necessary excavation for a foundation.

Very respectfully,

R. L. HOXIE,
Lt. Eng'rs, U. S. A., and Eng'r D. C.

XXIV.

On the 4th June, 1875, the claimant addressed a letter to the Commissioners respecting the parapet on the canal wall to be built under the extension of the contract; to which letter the engineer of the District replied on the 19th June, 1875. The following are copies of those letters:

WASHINGTON, *June* 4, 1875.

To the COMMISSIONERS OF THE DISTRICT OF COLUMBIA:

GENTLEMEN: I would respectfully state that after repeated trials I find
I will not be able to make as complete a job of the coping of the
39 canal wall which I am now constructing as I and the engineer of
the District desire. To dress and fit the river stone is an expensive, arduous, and very unsatisfactory work; therefore I desire to make to you the following proposition: That I be allowed to use for the coping North River or other suitable coping stone, for which I will be allowed an extra compensation of forty (40) cents per foot. This stone will cost

me, delivered on the ground, nearly one (1) dollar per foot, but I am willing to bear more than one-half the expense, only asking the District government to assume the proportion I have named. In making this proposition I do it with the desire to benefit the District government and secure for it a complete, finished, and handsome work, and believe that it will be for the interest of the District for its authorities to accept my proposition. In the hope that my proposition may be promptly and favorably considered,

I am, gentlemen, very respectfully,

JOHN J. SHIPMAN.

ENGINEER'S OFFICE, DISTRICT OF COLUMBIA,
Washington, June 19th, 1875.

J. J. SHIPMAN, Esq., *City:*

SIR: You are requested to call at this office to execute the necessary papers for an extension to your contract, No. 561, with the late Board of Public Works, to include the finishing of the parapet wall along the Little Fall road with North River coping at 40 cents per lineal foot, payable in 3.65 bonds, at par.

Very respectfully,

R. L. HOXIE,
Lieut. Engineers, U. S A., Engineer of D. C.

XXV.

Under the direction and constant supervision of the defendant's engineers, the claimant performed the work provided for in this extension of contract 561 during the year 1875. During the progress of the work reports were made by the engineer in charge to the chief engineer of the District, and partial payments were made thereon, as follows:

ENGINEER'S OFFICE, DISTRICT OF COLUMBIA,
Washington, March 2d, 1875.

To the honorable the BOARD OF AUDIT:

GENTLEMEN: I transmit herewith a partial measurement of contract No. 561 of the late Board of Public Works with John J. Shipman, amounting to $54,019.31.

I recommend that 20% of the amount found due be withheld.

Very respectfully,

B. OERTLY,
Asst. Engineer of D. C., in charge.

WASHINGTON, D. C., *M'ch 2d*, 1875.

District of Columbia to J. J. Shipman Dr.

36,477.14 square yards of macadam pavement laid, at 1.50 *cents* per yard		54,715 71
Deduct property.....	716 46	
Deduct macadam in Carpenter's measurement, vou. 168 & 169 of 1874	3,176 67	
	3,893 13	3,893 13
		50,822 58
Retain 20%.....		10,184 51
		40,638 07
		$54,715 71

(On the margin:) Partial.

I hereby certify that I have measured and inspected the work done by J. J. Shipman on the improvement of Canal Road street (between Aqueduct and Chain Bridge), embraced in the foregoing account, which work was done under the order of the Board of Public Works (contract No. 561), and find it correct as to quantity and quality, and that the work has been done and material and labor furnished as per contract and specifications.

Dated March 2, 1875.

L. H. BODFISH,
Assistant Engineer.

40	Deduct for material, as follows:	
	36 feet of 12-inch straight sewer pipe.....	$23 40
864	cart-loads of cobble-stone	648 00
100	cubic yards of gravel.....	25 00
		$696 40
113	ft. 6-in. pipe, 17	20 06
		716 46

I certify that the foregoing is a correct statement of material furnished. March 2nd, 1875.

E. B. TOWNSEND,
Superintendent of Property.

187—. Examined and found correct.

B. OERTLY,
Computing Engineer.

I certify that the foregoing is a correct account of material furnished' and that the prices charged are the net value of the material at the point where delivered, or in accordance with contract.

E. B. TOWNSEND,
Superintendent of Property,
Per BECKETT.

JULY 17TH, 1875.

42 I have carefully examined the account and find the prices according to contract, and the computations correct.

The amount due the contractor is to be ascertained by deducting from the above cost of the work the total advances unsettled, and also for —— not previously charged, the sum of——.

B. OERTLY,
Assistant Engineer.

JULY 17TH, 1875.

Approved, subject to future inspection of the work, $111,572.59.

R. L. HOXIE,
Lieut. Engineer, U. S. A., and Engineer for D. C.

JULY 20TH, 1875.

(Endorsed on back:) 14695.
Account No. 463, July 16th, 1875.
J. J. Shipman, bill for work done on Canal road (bet. Aqueduct and Chain Bridge), $——.

WASHINGTON, D. C., *July 21st*, 1875.

District of Columbia to John J. Shipman Dr.

Contract No. 561.

For partial measurement of work on Canal road.....		111, 572 59
Deduct Carpenter's measurement, voucher 168 & 9, 1874.....	$3, 176 67	
Deduct material, including file No. 526.....	2, 438 97	
" pay-roll.....	438 75	
" part of certificate 14105 of 1875.....	38, 090 17	
		44, 144 56
Balance		$67, 428 03
Withhold 30 % engineer's recommendation.....		20, 228 40
Balance payable.....		47, 199 63

Received this 22d day of July, 1875, from the Board of Audit, their certificate No. 14695 for $47,199.63, in full settlement of the above-stated claim.

JOHN J. SHIPMAN.

(Endorsed on back:) 14695.

OFFICE BOARD OF AUDIT,
Washington, July 20th, 1875.

1, 2, 3, 4, Class 4, No. 1884.

Claims against the Board of Public Works for which no evidence of indebteness has beeen issued.

Work under contract # 561.

(In lead pencil:) [Not to be delivered except in the presence of Mr. W. Fletcher.]

Paid July 22d, '75.

Ownership claimed by Jno. J. Shipman, o. s.

OFFICE BOARD OF AUDIT,
Washington, July 21st, 1875.

The within claim against the Board of Public Works has been examined, and amount due, as per within statement, $47,199.63.

CHAS. A. APPEL,
Asst. Acct.

No. 6181, vol. B, 1875.

ENGINEER'S OFFICE, DISTRICT OF COLUMBIA,
Washington, August 18th, 1875.

To the honorable the BOARD OF AUDIT:

GENTLEMEN: I recommend that two-thirds of the amount heretofore retained on measurements of work performed by J. J. Shipman, under his contract No. 561 with the late Board of Public Works, be paid him.

Very respectfully,

R. L. HOXIE,
Lieut. Engineers, U. S. A., Engineer of D. C.

43 WASHINGTON, D. C., *Aug. 20th*, 1875.

District of Columbia to J. J. Shipman Dr.

For contract 561. Canal road.

Total am't retained.....	$20,228 40
Am't due per engineer's recommendation.....	13,485 60

Received this 25th day of August, 1875, from the Board of Audit their certificate No. 14815 & 16 for $13,485.60 in full settlement of the above-stated claim.

JOHN J. SHIPMAN.

(Endorsed on the back:) 14815 & 16, o. s.

OFFICE BOARD OF AUDIT,
Washington, August 19, 1875.

Class 4, No. 1955.

Claims against the Board of Public Works for which no evidence of indebtedness has been issued.

Retain on contract 561

Paid August 25, '75.

Ownership claimed by J. J. Shipman.

OFFICE BOARD OF AUDIT,
Washington, Aug. 20th, 1875.

The within claim against the Board of Public Works has been examined and am't due $13,485.60.

CHAS. A. APPEL,
Asst. Acct.

No. 7099, vol. C, 1875.

ENGINEER'S OFFICE, DISTRICT OF COLUMBIA,
Washington, Sept. 25th, 1875.

To the honorable the BOARD OF AUDIT:

GENTLEMEN: I transmit herewith a partial measurement of contract No. 561 of the late Board of Public Works with J. J. Shipman, amounting to $135,229.19.

Total amount of advances to date $4,892.39.

I recommend that 20 % of the amount found due be withheld.

Very respectfully,

R. L. HOXIE,
Lieut. Engineers, U. S. A., Engineer of D. C.

Account for work done on Canal road between Aqueduct and Chain Bridge.

WASHINGTON, D. C., *Sept.* 24, 1875.

District of Columbia to J. J. Shipman Dr.

4,550 cub. yds. retaining wall, @ $5.00	$22,750	00
1,511 square " cobble gutters, 60c	906	76
Add measurement of March 2d, 1875	54,715	10
" " " July 20th, "	56,856	88
Total for measurement	135,229	19

Property %.

J. J. SHIPMAN.

Total reported	$4,892	39
36 ft. 12-in. pipe	23	40
864 cart loads cobble*	648	00
100 cubic yds. gravel	25	00
118 ft. 6-in. pipe, 17	20	06
300 " 6-in. " 17	51	00
1,206 $\frac{9}{12}$ ft. coping, 125	1,508	44
44 1,884 $\frac{10}{12}$ " " 125	2,356	05
255 ft. 15-in. pipe, 119	280	50
	4,912	45
Increase is 118 ft. 6-in. pipe	20	06
	4,892	39

* Errors should be 25c. per cart load.

Certificates issued:	
14105	$38,090 17
14695	47,199 63
Pay-roll	438 75
14815 & 16	13,485 60
	$99,214 15

I hereby certify that I have carefully examined the field notes and report Louis Green, leveller, who measured and inspected this work and find the quantities correct. The work is reported to be contract #561, Canal road, between Aqueduct & Chain Bridge.

Sept. 24, 1875.

L. H. BODFISH,
Assistant Engineer.

Materials furnished upon this or other contracts, brought forward from voucher No. 575	$4,611 89
To———.	
Materials furnished since last report upon contract No.———.	
255 ft. 15-in. sewer pipe for Canal road, @ 110	$280 50
	$4,892 39

I certify that the foregoing is a correct account of material furnished, and that the prices charged are the net value of the material at the point where delivered, or in accordance with contract.

Sept. 25th, 1875.

T. O. BECKETT,
Act'g Superintendent of Property.

I have carefully examined the account, and find the prices according to contract and the computations correct.

The amount due the contractor is to be ascertained by deducting from the above cost of the work the total advances unsettled, and also for ——— not previously charged the sum of ———.

Sept'r 25, 1875.

B. OERTLY,
Assistant Engineer.

Approved, subject to future inspection of the work..... $135,229 19

Sept'r 26, 1875.

R. L. HOXIE,
Lieut. Engineer, U. S. A., and Engineer for D. C.

(Endorsements:) Account No. 656. Sept. 24th, 1875. J. J. Shipman's bill for work done on Canal road (bet. Aqueduct and Chain Bridge), $135,229.19.

WASHINGTON, D. C., *Sept.* 28, 1875.

District of Columbia to J. J. Shipman Dr.

For contract 561, Canal road, Aqueduct and Chain Bridges:

Partial measurement	135,229 19
Deduct property	4,912 45
	130,316 74
Deduct certificates	99,214 15
	31,102 59
Retain 20%	6,220 51
Balance	24,882 08

45 Received, this 29th day of Sept., 1875, from the Board of Audit, their certificate, No. 19002 & 3 for $24,882.08, in full settlement of the above-stated claim.

JOHN J. SHIPMAN.

(Endorsements:) 19002 & 3, o. s.

OFFICE BOARD OF AUDIT,
Washington, Sept. 28, 1875.

Class 4, No. 2084.

Claims against the Board of Public Works for which no evidence of indebtedness has been issued. Contract No. 561.
Ownership claimed by John J. Shipman.
Paid Sept. 29, 1875.

OFFICE BOARD OF AUDIT,
Washington, Sept. 28, 1875.

The within claim against the Board of Public Works has been examined and amt. due $24,882.08.

CHAS. A. APPEL,
Ass't Acc't.

No. 8982, vol. C, 1875.

ENGINEER'S OFFICE, DISTRICT OF COLUMBIA,
Washington, Dec. 23*d*, 1875.

To the honorable the BOARD OF AUDIT:

GENTLEMEN: I transmit herewith a measurement—partial so far as relates to Canal road from Aqueduct to Chain Bridges—of contract No. 561 of the late Board of Public Works with J. J. Shipman, amounting to $188,109$\frac{55}{100}$.

I recommend the usual reservation upon work of this character.

Very respectfully,

R. L. HOXIE,
Lieut. Engineers, U. S. A., Engineer of D. C.

WASHINGTON, D. C., *Dec.* 21, 1875.

District of Columbia to J. J. Shipman Dr.

6,928.13 square yards new cobble-stone gutters laid, at 60 cts. per yd	$4,156 88
105 running feet 15-in. pipe, at 1.38 cents per foot	144 90
205 running feet 18-in. pipe, at 1.62 " "	332 10
96 running feet 5-in. pipe, at .36 " "	34 56
9 running feet 10-in. pipe, at .69 " "	6 21
13,289 running feet coping, at .40 " "	5,315 60
45,557.47 square yards m'cadam pavement laid, at 1.50 cts. per yd	68,336 20
21,739.2 cubic yards retaining wall, at 5.00 cts. per yd	108,696 00
14 drops, at 71.25	997 50
224 cubic yards sewer excavation, at .40 " "	89 60
Total for assessment	$188,109 55

(On the margin:) Partial.

Property of J. J. Shipman.

36 feet 12-in. pipe		23 40
864 cart-loads cobble, 25c	=	216 00
100 cubic yards gravel, 25	=	25 00
118 ft. 6-in. pipe, 17	=	20 06
300 " 6-in. " 17	=	51 00
1,374½ ft. coping, 1.25	=	1,718 24
255 " 15-in. pipe, 1.10	=	280 50
Total		2,334 30

Certificates issued: 14105, $38,090.17; 14695, 47,199.63; pay-roll, 438.75; 14815 & 16, 13,485.60; 19002 & 3, 24,882.08.

46 I hereby certify that I have carefully examined the field-notes and report of Thos. Franklin and Louis Green, leveler, who measured and inspected this work, and find the quantities correct.

The work is reported to be Canal road, between Aqueduct and Chain Bridge. Contract No. 561.

L. H. BODFISH,
Assistant Engineer.

DEC. 22, 1875.

Material furnished upon this or other contracts, brought forward from voucher No. —, value ——— to ———.

Materials furnished since last report upon contract No. —. See voucher 656.

Cr. by 99 feet 6 x 24 in. B. S. coping transferred to T. Lucas, at 1.25	$123 75
Cr. by 1,618 feet 6 x 24 in. B. S. coping returned to 6th st. wh'f, at 1.25	2,022 50

I certify that the foregoing is a correct account of material furnished, and that the prices charged are the net value of the material at the point where delivered, or in accordance with contract.

E. B TOWNSEND,
Superintendent of Property.

DEC. 22D, 1875.

I have carefully examined the account, and find the prices according to contract, and the computations correct.

The amount due the contractor is to be ascertained by deducting from the above cost of the work the total advances unsettled, and also for —— ——— not previously charged, the sum of ———.

B. OERTLY,
Assistant Engineer.

DEC. 23, 1875.

Approved, subject to future inspection of the work. $188,109$\frac{55}{100}$.
Dec. 23, 1875.

R. L. HOXIE,
Lieut. Engineer, U. S. A., and Engineer for D. C.

(Endorsements:) Cert. No. 19458.
Account 975, Eng'r Office, vol. —, 187–.
Pavements for sidewalks and carriageways.
Dec. 21st, 1875. J. J. Shipman bill for work done on Canal road (bet. Aqueduct and Chain Bridge), $188,109.55.
Partial measurement.

WASHINGTON, D. C., *Dec.* 24, 1875.

District of Columbia to J. J. Shipman Dr.

For contract 561, surface Canal road, partial measurement..		$180, 109 55
Deduct property.....	$2, 334 20	
Deduct certificates.....	124, 096 23	
Deduct Carpenter's measurement.....	3, 176 67	
		129, 607 10
		58, 502 45

Received, this 27th day of December, 1875, from the Board of Audit, their certificate, No. 19458, for $58,502.45, in full settlement of the above-stated claim.

JOHN J. SHIPMAN.

(Endorsements:) 19458, o. s.

OFFICE BOARD OF AUDIT,
Washington, Dec. 23, 1875.

Class 4, No. 2421.

Claims against the Board of Public Works for which no evidence of indebtedness has been issued. Contract No. 561.
Ownership claimed by J. J. Shipman. 12.
Pd. December 27, '75.

47

OFFICE BOARD OF AUDIT,
Washington, Dec. 24, 1875.

The within claim against the Board of Public Works has been examined and am't due $58,502.45.

CHAS. A. APPEL,
Ass't Acc't.

XXVI.

When the work was completed the claimant applied for a final measurement and settlement. The following is a copy of the measurement then made:

No. ——, vol. ——, 187—.

ENGINEER'S OFFICE, DISTRICT OF COLUMBIA,
Washington, Jan'y 25, 1876.

To the honorable the BOARD OF AUDIT:

GENTLEMEN: I transmit herewith measurement final, so far as it relates to Canal road bet. Aqueduct and Chain Bridges, of contract No. 581 of the late Board of Public Works, with J. J. Shipman, amounting to $210,633.91.

Total amount of advances since last report, $141.00

I recommend the usual reservation upon work of this character.

Very respectfully,

B. OERTLY,
Ass't Engineer in Charge.

WASHINGTON, D. C., *Jan'y* 25, 1876.

District of Columbia to J. J. Shipman Dr.

6,928.13 square yards new cobble-stone gutters laid, @ 60 c. per yd	4,156	88
105 running feet 15-inch pipe, at 138 cents per foot	144	90
205 running feet 18-inch pipe, at 162 " " "	332	10
96 running feet 6-inch pipe, at 36 " " "	34	56
9 running feet 10-inch pipe, at 69 " " "	6	21
13,289 running feet coping, at 74.4 " " "	9,887	01
32,218 cubic yards grading, at 30 cents per yard	9,665	40
32,218 cubic yards haul 1,960 ft. over 200 ft., at 24½ cents per yard	7,893	41
45,557.47 square yards mcadam pavement laid, at 150 cents per yard	68,336	20
21,739.2 cubic yards retaining wall, at 5.00	108,696	00
14 drops, at 71.25	997	50
224 cubic yards excavation, at .40	89	60
1 cesspool	857	14
	$211,096	91
Less masonry of cesspool included in the balance measurement, 92.6 cu. yards, at $5.00	463	00
	210,633	91
4,528 cu. yards of broken stone filling, @ $1.25 = $5,660.00 if allowed.		
Total for assessment		

OFFICE BOARD OF AUDIT,
Washington, ———, 187 .

Property acc't. J. J. Shipman.

36 ft. 12-in. pipe	$23 40
864 " loads cobble, 25	216 00
100 cu. yds. gravel, 25	25 00
118 ft. 6-in. pipe, 17	20 06
300 " 6-in. " 17	51 00
1,374½ ft. coping, 1.25	1,718 24
255 " 15-in. pipe, 1.10	280 50
141 cu. yds. cobble, 1.00	141 00
	2,475 20

48 Certs. issued: 14105, 38,09.17; 14695, 47,109.63; pay-roll, 000.00, never paid; 14815 & 16 = 13,485.60; 19002 & 3, = 24,882.08; 19458, 58,502.45 = 182,159.93.

There has not been audited anything for payment of J. J. Shipman's laborers by me.

JOHN T. VINSON,
Aud'r D. C.

I hereby certify that I have carefully examined the field-notes and report of Thos. Franklin, leveller, who measured and inspected this work and find the quantities correct.

The work is reported to be ———, Canal road bet. Aqueduct and Chain Bridges. Contract No. 561.

January 25, 1876.

L. H. BODFISH,
Assistant Engineer.

Material furnished upon this or other contracts, brought forward from voucher No. ———; value ———, to ———.

Materials furnished since last report upon contract No. see voucher No. 1032, 141 cubic yards cobble-stones, 1.00, $141.00.

I certify that the foregoing is a correct account of material furnished, and that the prices charged are the net value of the material at the point where delivered, or in accordance with contract.

January 25, 1876.

E. B. TOWNSEND,
Superintendent of Property,
Per BECKETT.

I have carefully examined the account, and find the prices according to contract and the computations correct.

The amount due the contractor is to be ascertained by deducting from the above cost of the work the total advances unsettled and also for —— not previously charged, the sum of ———.

———— —, 187—.

———— ————,
Assistant Engineer.

Approved, subject to future inspection of the work.
January 25, 1876.

B. OERTLY,
Assistant Engineer,
Per Lieut. Engineer, U. S. A., and Engineer for D. C.

(Endorsed on the back:) Cert. No. 1134.
Account —— eng'r office, ——, vol. —— 187—.
Pavements for sidewalks and carriageways.
January 25, 1876.
J. J. Shipman's bill for work done on Canal road (bet. Aqueduct and Chain Bridges), $210,633.91.
Final measurement.

XXVII.

The claimant was thereupon paid the balance due according to said measurement, as shown by the following papers and voucher:

WASHINGTON, D. C., *January* 26, 1876.

District of Columbia to J. J. Shipman Dr.

For contract 561, surface Canal road:

Final measurement		210,633 91
Deduct property	2,475 20	
" certificates	182,159 93	
" amount paid on Carpenter's meas...	2,343 35	
		186,978 48
Balance		$23,655 43

49 Received, this 27th day of January, 1876, from the Board of Audit, their certificate, No. 25013, for $23,655.43, in full settlement of the above-stated claim.

JOHN J. SHIPMAN.

(Endorsed on the back:) 25013.

OFFICE BOARD OF AUDIT,
Washington, January 25, 1876.

Class 4, No. 2584.

Claims against the Board of Public Works for which no evidence of indebtedness has been issued.
Contract 561.
Paid January 27, 1876.
Ownership claimed by J. J. Shipman.

OFFICE BOARD OF AUDIT,
Washington, January 26, 1876.

The within claim against the Board of Public Works has been examined and amount due $23,655.43.

CHAS. A. APPEL,
Ass't Acc't.

XXVIII.

The application of the claimant for a measurement was received in the engineer's office during the absence of the engineer-in-chief. By the personal direction of Mr. Ketchum, one of the Commissioners of the District, Mr. Oertly then acted as engineer, in the absence of Mr. Hoxie, and caused the measurements set forth in Finding XXVI to be made and certified to them. Subsequently Mr. Hoxie expressed dissatisfaction with this measurement, and caused a new measurement to be made, which he called a final measurement, to which he certified. The following is a copy of this last measurement and of the letter transmitting the same:

ENGINEER'S OFFICE, DISTRICT OF COLUMBIA,
Washington, April 15th, 1878.

To the honorable the COMMISSIONERS OF THE DISTRICT OF COLUMBIA:

GENTLEMEN: In compliance with your instructions contained in your endorsement of Sept. 13th, 1876, upon letter of auditor of D. C. of Sept. 1st, 1876 (No. 6025, E. O., 1876), I transmit herewith final measurement of work done on the Little Falls road under contract No. 561 of the late Board of Public Works with J. J. Shipman, amounting to $168,832.50.

Referring to my letter to the Board of Audit, dated Feb'y 5th, 1877 [6], in which notice is given of my disapproval of certain measurements of contract work transmitted to the Board of Audit during my absence from the city, which letter is now in the possession of the auditor of D. C., with the records and accounts of the Board of Audit, as also to No. 1589, E. O., 1876, enclosed herewith, upon which you direct a report to be made to the Commissioners, I invite your attention to the following statement:

The accompanying final measurement (voucher 1382) takes the place of final measurement No. 1134, heretofore transmitted Jan'y 25, 1876, of which it corrects certain errors as follows:

1st. Masonry.—This is now measured in accordance with the specifications of the contract, and the actual work necessary for the observance in good faith of these specifications. In the former account the contractor was allowed for a useless excess of masonry over the specifications of his contract and the instructions given him. The excess is wholly unnecessary, and the contractor was repeatedly warned by myself that he would not be paid for it. He persisted, however, in constructing the wall to suit himself, giving at one time as a reason for the increased dimensions of the parapet wall that it was cheaper for him to increase these dimensions in order to work in the stone as it came from the quarry. If he has been mistaken in this assumption, the loss should fall upon himself and not upon the District, which derives no advantage from the result of the contractor's obstinacy in increasing the amount of his work in violation of the specifications of his contract and of positive orders to the contrary.

2d. Grading.—The grading required upon this road was simply the filling up of the ditches on either side of the macadam carriageway for the purpose of constructing the gutters. Knowing that it would be an accommodation to the contractor to allow him to dispose of the refuse material from his quarries by depositing it in these depressions, and that the large profit upon the work of macadamizing the roadway could not

be justified unless additional work were required for it, I purposely drew up the contract with the proviso that nothing should be paid for this filling. The attention of the contractor was called to this proviso by myself, and I am informed that a quantity of the refuse material of the quarries had to be boated over the canal for want of a dump. Any allowance upon this account is therefore in violation of the contract, and not even justified, if any departure from the contract can be justified, by any consideration of equity. An exception is made in the case of raising the grade of the roadway between certain points for protection of the large water main under it. For this a written and specific order was given, and the cost is allowed in the accompanying measurement. The remainder of the allowance for grading in former measurement is erroneous, and the overmeasurement upon this amounts to 799.3 cubic yards.

Erroneous computations in former measurement are corrected in this, which has been prepared after careful consideration of all communications from the contractor up to this date (herewith transmitted), and is a correct statement of account in accordance with contract, as well as a full and fair allowance for all work which has been done to the advantage of the District.

Very respectfully,

R. L. HOXIE,
Lieut. Engineers, U. S. A., Engineer of D. C.

(Indorsed:) Exhibit R. L. H., No. 2. No. 41559, 1878. Office of Commissioners D. C., April 15, 1878. Engineer D. C. transmits final measurement of work done on the Little Falls road, under contract No. 156 of the late Board of Public Works with J. J. Shipman, amounting to $168,832.50, and submits statement relative thereto. 21384. 21385.

OFFICE OF THE COMMISSIONERS
OF THE DISTRICT OF COLUMBIA,
Washington, D. C., April 20, 1878.

Respectfully referred to the auditor D. C. to file the enclosed amended statement of Shipman's final measurement with the unadjusted contractor's accounts. Board of Audit file.

By order:

GEO. R. CASWELL,
Act'g Sec'y.

6997 B. 76.

For work done on Canal road, between Aqueduct and Chain Bridges.

WASHINGTON, D. C., *Feb'y* 28, 1877.

District of Columbia to J. J. Shipman Dr.

6,928.13 yds. of new cobble-stone pav't, @ 60c	4,156	88
105 l. f. of 15″ pipe, @ $1.38	144	90
205 " " " 18 " @ 1.62	332	10
96 " " " 6″ " @ 36c	34	56
9 " " " 10″ " @ 69c	6	21
2,609.6 cu. yards of grading, @ 30c	782	88
45,557.47 sq. yds. of macadam, @ 1.50	68,336	20
17,236.83 c. yds. of masonry, in retaining walls, and blue-stone coping, @ $5.00	86,184	15

410.54 cu. yds. of masonry, in North River coping, @ $5.00.	2,052 70
13,301.7 l. f. of North River coping, @ 40c.....	5,320 68
14 drops, @ $71.25.....	997 50
224 cub. yards of excavation, @ 40c.....	89 60
1 cesspool.....	857 14
	$169,295 50
Less masonry of cesspool included in the balance of measurement	463 00
	168,832 50

51 926 cu. yds. @ $5.00.

This measurement includes all former vouchers.

Proper credits to be applied for assessments. See letters of July 3 and July 21, 1876, from this office, addressed to the auditor of D. C.

Total for assessment.

1382.

I hereby certify that I have carefully examined the field-notes and report of David E. McComb and Thos. Franklin, levelers, who measured and inspected this work, and find the quantities correct.

The work is reported to be well and properly done.

Contract No. 561.

March 8, 1878.

DAVID E. McCOMB.

Materials furnished upon this or other contracts, brought forward from voucher No. —, value ——— to ———.

Materials furnished since last report upon contract No. —.

None furnished.

I certify that the foregoing is a correct account of material furnished, and that the prices charged are the net value of the material at the point where delivered, or in accordance with contract.

March 13th, 1878.

E. B. TOWNSEND,
Superintendent of Property.

I have carefully examined the account, and find the prices according to contract, and the computations correct.

The amount due the contractor is to be ascertained by deducting from the above cost of the work the total advances unsettled, and also for ——— not previously charged, the sum of ———.

April 13, 1878.

B. OERTLY,
Assistant Engineer.

Approved, subject to future inspection of the work.

See letter of transmittal, dated Ap'l 15, 1878.

R. L. HOXIE,
Lieut. Engineer, U. S. A., and Engineer for D. C.

(Endorsed:) Exhibit R. L. H., No. 1. Special account No. 1382. Feb'y 28, 1877. J. J. Shipman's bill for work done on Canal road (bet. Aqueduct and Chain Bridge sts.), $168,832.50. Final measurement.

XXIX.

From these two conflicting measurements spring the controversies in regard to the fourth item in the claimant's bill of particulars, respecting the coping of the wall; in regard to the seventh item therein, respecting earth excavation for foundation of wall; in regard to the eighth item therein, respectiug broken stone back of the retaining walls; and in regard to the item in the amended petition respecting the excavations for the lining in the rear of the retaining walls. From the same causes spring the items in the defendant's bill of particulars for counter-claim respecting overpayment on account of stone masonry, respecting overpayment on account of coping, and respecting overpayment by mistake of fact for grading. The facts proved by the evidence with respect to these several subjects of controversy, so far as the same have not been already found, are as follows:

A.—The masonry.

The wall is not constructed in accordance with the specifications. It varies therefrom by reason of being thicker, and contains 4,091.83
52 cubic yards of masonry more than it would have contained if it had been constructed according to the specifications. This variation was made with the knowledge and consent of the Commissioners and of the engineer in charge of the work, who approved of the reasons given for doing it, and it might at any time have been known to the chief engineer had he made inquiry or a personal examination. The measurements which were from time to time returned to the chief engineer were accurate returns of the amount of masonry done at each return; and the wall was constructed as to the amount of masonry in the manner as shown in the measurement set forth in Finding XXVI.

B.—The coping.

There was a controversy whether the claimant should be paid for the North River stone coping by the lineal foot or by the square foot. The claimant also demanded payment for it as masonry under the contract, in addition to payment by the foot. The claimant, the Commissioners, and Mr. Oertly, who was acting as chief engineer in the absence of Mr. Hoxie, met together and agreed upon the rate in the estimate set forth in Finding XXVI. The claimant has not been paid for the coping as masonry. There were 410.54 cubic yards of masonry in the coping.

C.—Excavation.

The claimant has been paid nothing for excavating the foundation of the walls or of the place for the lining in their rear, except so far as general payments under the contract cover that work; the defendant contending that the prices for the wall cover the excavation for it and the whole cost of the lining. The amount of such excavation is not satisfactorily shown.

D.—Lining of the walls.

The specifications called for gravel as a lining at the back of the retaining wall. There being no gravel near the line of the road, at the

claimant's request broken stone was substituted with the defendant's consent. The claimant has not been paid for this lining otherwise than as the same may be held to be included in the contract price for the wall.

E.—OVERPAYMENT FOR GRADING.

In the measurement set forth in Finding XXVI will be found the following items: "32,218 cubic yards grading;" "32,218 cubic yards haul." These items relate to the same material.

In the same measurement will be found the following item: "45,557.47 square yards macadam pavement;" 15,185.82 yards of material which was estimated in that estimate as part of the 32,218 cubic yards of grading and of haul, was also included in the measurement and estimate of the 45,557.47 square yards macadam. It was correctly measured as macadam, but incorrectly and by mistake of fact estimated and measured as grade and as haul.

It is not shown that any other overpayment was made to the claimant on account of grading and by mistake of fact.

53 XXX.

CONDUIT ROAD.

It does not appear that the claimant furnished any material or did any work on the Conduit road for which he has not been paid in full.

XXXI.

NEW CUT ROAD.

In August, 1875, some storms did great damage to the New Cut road near where the claimant was then at work with a large force. The engineer of the District addressed the following letter to the claimant:

ENGINEER'S OFFICE, DISTRICT OF COLUMBIA,
Washington, D. C., August 31st, 1875.

JOHN J. SHIPMAN, *City:*

SIR: You are authorized to repair the roads and culverts in the vicinity of the work now being performed by you along the Little Falls road, which have been damaged by the late storms, as extra work under your contract No. 561, with the late Board of Public Works. You will present this order with your bill for the work, which will be done under the direction of Mr. Cunningham and Mr. Carroll, overseers.

Very respectfully,

R. L. HOXIE,
Lieut. Engineers, U. S. A., Engineer of D. C.

XXXII.

The claimant at once began to do the work called for by the said letter of August 31. On the 29th December, 1875, he rendered a bill of

the work and materials furnished up to that time. The following is a copy of the letter inclosing said bill and of said bill:

DEC. 29TH, 1875.

Lieut. R. L. HOXIE, U. S. A.,
Eng'r of D. C.:

SIR: I have the honor to enclose herewith a bill for work done on New Cut road, bet. Georgetown and the Chain Bridge road, amounting to 15,-084.39. This work was done under an order of the engineer as extra work under contract 561, herewith enclosed, and represents the actual cost, with 20% added for profits. I have in my possession, to be produced if required, pay-rolls and vouchers, aggregating the amount above named. Your attention is invited to the fact that I have charged but 2.25 per day for carts, while the usual price is 2.50, and other prices in proportion. An early settlement will oblige

Yours, very respectfully,

JOHN J. SHIPMAN.

I, the undersigned, acknowledge to have received from the District of Columbia the sums set opposite my name in full payment of material used and for services rendered from August 25th, 1875, to December 24th, 1875, in the District of Columbia, on the New Cut road, leading from Georgetown to Canal road.

Seventy-eight thousand arch-brick, 78,000, $8.50	663	
Six hundred and forty-one bbls. cement, 641 (see bill)	920	95
Two hundred and forty-nine cart loads of sand, 279, .40	99	60
One hundred and ten cubic yds. of concrete, 110,3	330	
Fourteen hundred and fifty-two cubic yds. of building stone, 1,452, 1.50	2,178	
Laying seventy-eight thousand brick, 78,000, 4	312	
Lumber for centers (see bill)	137	77
Sawing portion of "at mill"	3	50
Three kegs nails, 3, 3.75	11	25
Thirty-three feet of 15-in. tile pipe, 33, 1.33	43	89
54 One trap and grate, 1, 71.25	71	25
Three hundred & fifty-eight loads of paving stone, 358 .75	268	50
Twenty-two hundred & one cubic yards of gutter, 2,201, .15	330	15
Seven hundred & sixty-five & one-half days' labour, 765½, 1.50	1,148	25
Fourteen hundred & fourteen & one-quarter days' labour, 1,414¼, 1.25	1,767	81
Eleven hundred & twenty-three & three-quarters days' labour of carts, 1,123¾, 2.25	2,528	43
Eighty-two days' labour of water-boys, 82, 50	41	00
Seventeen and one-quarter days of foreman, 17¼, 1.75	30	18
Fifty-seven days of foreman, 57, 2	114	
Sixty-eight & one-half days of foreman, 68½, 2.25	154	12
One hundred & eighty-six & three-quarters days of masons, 186¾, 2.50	466	88

claimant's request broken stone was substituted with the defendant's consent. The claimant has not been paid for this lining otherwise than as the same may be held to be included in the contract price for the wall.

E.—OVERPAYMENT FOR GRADING.

In the measurement set forth in Finding XXVI will be found the following items: "32,218 cubic yards grading;" "32,218 cubic yards haul." These items relate to the same material.

In the same measurement will be found the following item: "45,557.47 square yards macadam pavement;" 15,185.82 yards of material which was estimated in that estimate as part of the 32,218 cubic yards of grading and of haul, was also included in the measurement and estimate of the 45,557.47 square yards macadam. It was correctly measured as macadam, but incorrectly and by mistake of fact estimated and measured as grade and as haul.

It is not shown that any other overpayment was made to the claimant on account of grading and by mistake of fact.

53 XXX.

CONDUIT ROAD.

It does not appear that the claimant furnished any material or did any work on the Conduit road for which he has not been paid in full.

XXXI.

NEW CUT ROAD.

In August, 1875, some storms did great damage to the New Cut road near where the claimant was then at work with a large force. The engineer of the District addressed the following letter to the claimant:

ENGINEER'S OFFICE, DISTRICT OF COLUMBIA,
Washington, D. C., August 31st, 1875.

JOHN J. SHIPMAN, *City:*

SIR: You are authorized to repair the roads and culverts in the vicinity of the work now being performed by you along the Little Falls road, which have been damaged by the late storms, as extra work under your contract No. 561, with the late Board of Public Works. You will present this order with your bill for the work, which will be done under the direction of Mr. Cunningham and Mr. Carroll, overseers.

Very respectfully,

R. L. HOXIE,
Lieut. Engineers, U. S. A., Engineer of D. C.

XXXII.

The claimant at once began to do the work called for by the said letter of August 31. On the 29th December, 1875, he rendered a bill of

the work and materials furnished up to that time. The following is a copy of the letter inclosing said bill and of said bill:

DEC. 29TH, 1875.

Lieut. R. L. HOXIE, U. S. A.,
Eng'r of D. C.:

SIR: I have the honor to enclose herewith a bill for work done on New Cut road, bet. Georgetown and the Chain Bridge road, amounting to 15,-084.39. This work was done under an order of the engineer as extra work under contract 561, herewith enclosed, and represents the actual cost, with 20% added for profits. I have in my possession, to be produced if required, pay-rolls and vouchers, aggregating the amount above named. Your attention is invited to the fact that I have charged but 2.25 per day for carts, while the usual price is 2.50, and other prices in proportion. An early settlement will oblige

Yours, very respectfully,

JOHN J. SHIPMAN.

I, the undersigned, acknowledge to have received from the District of Columbia the sums set opposite my name in full payment of material used and for services rendered from August 25th, 1875, to December 24th, 1875, in the District of Columbia, on the New Cut road, leading from Georgetown to Canal road.

Seventy-eight thousand arch-brick, 78,000, $8.50	663	
Six hundred and forty-one bbls. cement, 641 (see bill)	920	95
Two hundred and forty-nine cart loads of sand, 279, .40	99	60
One hundred and ten cubic yds. of concrete, 110,3	330	
Fourteen hundred and fifty-two cubic yds. of building stone, 1,452, 1.50	2,178	
Laying seventy-eight thousand brick, 78,000, 4	312	
Lumber for centers (see bill)	137	77
Sawing portion of "at mill"	3	50
Three kegs nails, 3, 3.75	11	25
Thirty-three feet of 15-in. tile pipe, 33, 1.33	43	89
54 One trap and grate, 1, 71.25	71	25
Three hundred & fifty-eight loads of paving stone, 358 .75	268	50
Twenty-two hundred & one cubic yards of gutter, 2,201,.15	330	15
Seven hundred & sixty-five & one-half days' labour, 765½, 1.50	1,148	25
Fourteen hundred & fourteen & one-quarter days' labour, 1,414¼, 1.25	1,767	81
Eleven hundred & twenty-three & three-quarters days' labour of carts, 1,123¾, 2.25	2,528	43
Eighty-two days' labour of water-boys, 82, 50	41	00
Seventeen and one-quarter days of foreman, 17¼, 1.75	30	18
Fifty-seven days of foreman, 57, 2	114	
Sixty-eight & one-half days of foreman, 68½, 2.25	154	12
One hundred & eighty-six & three-quarters days of masons, 186¾, 2.50	466	88

Sixty-seven days " "67, 3	201	
Forty-eight & three-quarters days of masons, 48¾, 3.50	170	63
Forty-two and one-half days of head mason, 42½, 4	170	
	12,166	16
Add twenty per cent	2,433	23
Ninety-seven days of sup'endant, 97, 5	485	
	15,084	39

JOHN J. SHIPMAN.

XXXIII.

The Commissioners were unable to pay the bill in cash. Subsequently a aew account was rendered on the basis of a payment in bonds, which was agreed to by the three Commissioners and by Mr. Oertly, acting as assistant engineer in the absence of Mr. Hoxie, and was paid in full by a certificate of the Board of Audit. The said last-named bill and the claimant's acknowledgment of payment are in the following forms:

Special account for work done on ——— between ——— and ———.

WASHINGTON, D. C., *Jan'y 6th*, 1876.

District of Columbia to John J. Shipman Dr.

To labor and material furnished in repairs on New Cut road, between Georgetown and the Chain Bridge, as per subvoucher	$22,182 92

Total for assessment, ———.

I hereby certify that I have carefully examined the field-notes and report of ——— ———, leveler, who measured and inspected this work, and find the quantities correct.

The work is reported to be, ———.

Extra work under contract No. 561, ———.

——— —, 187–.

——— ———,
Assistant Engineer.

Materials furnished upon this or other contracts, brought forward from voucher No. —; value, ——— to ———. Materials furnished since last report upon contract No. —. (See voucher No. 977.)

No material furnished.

I certify that the foregoing is a correct account of material furnished, and that the prices charged are the net value of the material at the point where delivered, or in accordance with contract.

Jan'y 6th, 1876.

E. B. TOWNSEND,
Superintendent of Property,
Per BECKETT.

55 I have carefully examined the account, and find the prices according to contract and the computations correct.

The amount due the contractor is to be ascertained by deducting from the above cost of the work the total advances unsettled, and also for ———, not previously charged, the sum of ———.

Jan'y 6th, 1876.

B. OERTLY,
Assistant Engineer.

Approved, subject to future inspection of the work.
$22,182.92.
Jan'y 6, 1876.

B. OERTLY,
Ass't Engineer, for Lieut. Engineer, U. S. A., and Engineer for D. C.

WASHINGTON, D. C., *Jan.* 8th 1876.

District of Columbia, *J. J. Shipman, Dr.*

For contract 561, New Cut road:
Extra work, as per statement of the engineer..... $22,182 92

Received this 10th day of January, 1875, from the Board of Audit, their certificate, No. 19539, for $22,182.92, in full settlement of the above stated claim.

JOHN J. SHIPMAN.

XXXIV.

The claimant continued to do work on the said New Cut road, and on the 27th March, 1876, rendered a further account of the same to the amount of $6,682.20, as follows:

WASHINGTON, D. C., *March* 27, 1876.

District of Columbia to J. J. Shipman Dr.

To work performed on the New Cut road leading from Georgetown to Canal road, as per accompanying pay-roll..... $6,682 20

Work done under order of engineer D. C., August 31, 1875, a copy of which is enclosed.

Endorsed as follows:
20645, 1876, C. No. 1182 (engineer's office, vol. a), 1876.

WASHINGTON, D. C., *March* 27, 1876.

Shipman, John. Bill for work performed on New Cut road from Georgetown to Canal road, $6,682.20. Copy of order enclosed. 3651 B., 1876. C. L. B., vol. 12, p. 13.

Respectfully referred to the engineer D. C. for early report.

By order.

WM. TINDALL,
Secr'y.

MCH. 29, '76.

Referred in engineer's office to Mr. Cunningham for early report. Mr. McComb make measurement with 11845, E. O., 1875, enclo. 1.

Copy of enclosure.

I, the undersigned, acknowledge to have received from the District of Columbia the sums set opposite my name, in full payment of salaries, material used, and for services rendered from January 1st, 1876, to February 23d, 1876, in the District of Columbia, on the New Cut road leading from Georgetown to the Canal road:

Head masons, stone work,	27¼	days,	$4	per diem			109	
1st class " "	59¼	"	3.50	"	"		207	37
56 2nd " " "	39¼	"	3	"	"		117	75
Foreman of laborers,	83¾	"	2.50	"	"		216	88
" " "	46¾	"	2	"	"		93	50
Laborers, 1st class,	493¼	"	1.50	"	"		739	87
" 2nd "	409¾	"	1.25	"	"		512	63
" 3d "	189	"	1	"	"		189	00
" water-boy	20	"	50	"	"		10	
Horses,	969½	"	2.25	"	"		2,181	37
Concrete, 46 yards, $3 per yard							138	
Cement and cartage, as per bill							395	50
Sand, cart loads, 92, .40							36	80
Building stone, 300 yards, $1.50							450	00
							5,397	67
Add 20 per cent.							1,079	53
Superintendence, 41 days, $5							205	
							$6,682	20

XXXV.

The chief engineer of the District having objected to the settlement made by the Commissioners with the claimant, as set forth in Finding XXXIII, the following remeasurements of the work done by the claimant on the New Cut road then took place and were transmitted by the engineer to the Commissioners. The two measurements combined embrace the work included in the voucher in Finding XXXIII and that in the bill in Finding XXXIV.

ENGINEER'S OFFICE, DISTRICT OF COLUMBIA,
Washington, D. C., Dec. 14th, 1876.

To the honorable the COMMISSIONERS OF THE DISTRICT OF COLUMBIA:

GENTLEMEN: In compliance with your instructions contained in your endorsement of September 13, 1876, unon letter of auditor of D. C., dated September 1st, 1876 (6025 E. O., 1876), I transmit herewith final meas-

urement of work done on New Cut road by J. J. Shipman, under contract No. 561 of the late Board of Public Works, amounting to $24,352.29.

Very respectfully,

R. L. HOXIE,
Lieut. Engineers U. S. A., and Engineer of D. C.

Exhibit R. L. H., No. 3.
Respectfully referred to the auditor D. C.
By order.

WM. TINDALL,
Sec'y.

DEC. 16, '76.

Pavements for sidewalks and carriageways.

WASHINGTON, D. C., *May* 10, 1876.

District of Columbia to J. J. Shipman, Dr.

* * * * * * *

FINAL.

299 cub. yds. of concrete, @ $4.00	per yard.....	1,196	00
1,513 " " " masonry in cement, @ 6.50	" "	9,834	50
76,709 brick in wall, @ $23.00 per M.....		1,764	30
6,306.04 cub. yds. excavation, @ 30 per yd.....		1,891	81
4,520.45 " " embankment, @ 30 " "		1,356	13
4,520.45 " " hauled 1,800 ft. over 200, @ 22½.....		1,017	10
		$17,059	84

57 Voucher #1132, prior measurement, amounts to $22,182.92;
1232 showing an excess of former overmeasurement of $5,124.08.
Proper credits to be applied for assessment. See letters of July 3 and July 21, 1876, from this office, addressed to the auditor D. C.

Total for assessment, ———.

I hereby certify that I have carefully examined the field-notes and report of S. D. Charles, leveler, who measured and inspected this work, and find the quantities correct.
The work is reported to be well done.
New Cut road. Contract 561.
May 10th, 1876.

S. H. BODFISH,
Assistant Engineer.

Materials furnished upon this or other contracts brought forward from voucher No. —, value ———, to ———.
Materials furnished since last report upon contract No. —. See voucher #1134.
No measurement furnished.

I certify that the foregoing is a correct account of materials furnished, and that the prices charged are the net value of the material at the point where delivered, or in accordance with contract.

June 14th, 1876.

E. B. TOWNSEND,
Superintendent of Property.

I have carefully examined the account, and find the prices according to contract and the computations correct.

The amount due the contractor is to be ascertained by deducting from the above cost of the work the total advances unsettled, and also for ——— not previously charged the sum of ———.

Nov. 29, 1876.

B. ⁾ERTLEY,
Assistant Engineer.

Approved, subject to future inspection of the work.

See letter of transmittal, dated Feb'y 28, 1877.

——— ———,
Lieut. Engineer, U. S. A., and Engineer for D. C.

(Endorsed:) Special account. Cert. No. 1197. Account 6998, eng'r office, vol. B, 1876. May 10th, 1876. J. J. Shipman's bill for work done on New Cut road (bet. ——— and ——— st's). $17,059.84. Final measurement. Takes the place of #1132, heretofore transmitted.

WASHINGTON, D. C., *June 30th*, 1876.

District of Columbia to J. J. Shipman Dr.

* * * * * * *		
2,162.25 square yards new cobble-stone pavement laid, at 70 cents per yard	$1,513	57
* * * * * * *		
38 running feet 18-inch pipe, at $1.62 per foot	61	56
* * * * * * *		
5,659.95 cubic yards grading, at 30 cents per yard	1,697	99
* * * * * * *		
5,659.95 cubic yards haul, 834 ft. over 200 ft., at 10.425 per yard	590	05
130.2 cubic yards rock excavation made to obtain stone for wall, @ $1.00 per yard	130	20
* * * * * * *		
1 alley drop	91	25
108.86 perches of masonry = 100.166 cu. yards, @ $5.00	500	83
1,090.8 " " dry wall, @ 2.50	2,727	00
Add measurement of May 10th, 1876, voucher 1197	17,059	84
	24,352	29

58 This measurement includes all former vouchers.

Proper credits to be applied for assessment. (See letters of July 3 and July 21, 1876, from this office, addressed to the auditor D. C.)

Total for assessment, ———.

I hereby certify that I have carefully examined the field-notes of D. E. McComb, leveler, who measured this work, and find the quantities correct.
The work is reported to be New Cut road.
Contract 561.
Nov. 4, 1876.

S. H. BODFISH,
Assistant Engineer.

Material furnished upon this or other contracts brought forward from voucher No. — value, ——— to ———.
Materials furnished since last report upon contract, see voucher No. 1263.
None furnished.

I certify that the foregoing is a correct account of material furnished, and that the prices charged are the net value of the material at the point where delivered, or in accordance with contract.
August 25th, 1876.

E. B. TOWNSEND,
Superintendent of Property.

I have carefully examined the account, and find the prices according to contract and the computations correct.
The amount due the contractor is to be ascertained by deducting from the above cost of the work the total advances unsettled, and also for ——— not previously charged, the sum of ———.
Nov'r 29, 1876.

B. OERTLY,
Assistant Engineer.

Approved, subject to future inspection of the work. (See letter transmittal, dated Dec. 14th, 1876.)
———, 187—.

R. L. HOXIE,
Lieut. Engineer U. S. A., and Engineer for D. C.

XXXVI.

The claimant has never received any payment on account of the work done and materials furnished on said New Cut road, except the said certificate of the Board of Audit for $22,182.92. The reasonable worth of the construction of a dry wall, such as was constructed by the claimant, was at that time $3.50 per cubic yard.

XXXVII.

A large part of the amounts paid to the claimant as aforesaid was paid in certificates or in 3.65 bonds. It appears that the claimant disposed of some of these at less than their face value. But it does not appear how many he so disposed of, nor what loss, if any, he suffered thereby.

I certify that the foregoing is a correct account of materials furnished, and that the prices charged are the net value of the material at the point where delivered, or in accordance with contract.

June 14th, 1876.

E. B. TOWNSEND,
Superintendent of Property.

I have carefully examined the account, and find the prices according to contract and the computations correct.

The amount due the contractor is to be ascertained by deducting from the above cost of the work the total advances unsettled, and also for ——— not previously charged the sum of ———.

Nov. 29, 1876.

B. ⁾ERTLEY,
Assistant Engineer.

Approved, subject to future inspection of the work.

See letter of transmittal, dated Feb'y 28, 1877.

——— ———,
Lieut. Engineer, U. S. A., and Engineer for D. C.

(Endorsed:) Special account. Cert. No. 1197. Account 6998, eng'r office, vol. B, 1876. May 10th, 1876. J. J. Shipman's bill for work done on New Cut road (bet. ——— and ——— st's). $17,059.84. Final measurement. Takes the place of #1132, heretofore transmitted.

WASHINGTON, D. C., *June 30th*, 1876.

District of Columbia to J. J. Shipman Dr.

* * * * * * *	
2,162.25 square yards new cobble-stone pavement laid, at 70 cents per yard	$1,513 57
* * * * * * *	
38 running feet 18-inch pipe, at $1.62 per foot	61 56
* * * * * * *	
5,659.95 cubic yards grading, at 30 cents per yard	1,697 99
* * * * * * *	
5,659.95 cubic yards haul, 834 ft. over 200 ft., at 10.425 per yard	590 05
130.2 cubic yards rock excavation made to obtain stone for wall, @ $1.00 per yard	130 20
* * * * * * *	
1 alley drop	91 25
108.86 perches of masonry = 100.166 cu. yards, @ $5.00	500 83
1,090.8 " " dry wall, @ 2.50	2,727 00
Add measurement of May 10th, 1876, voucher 1197	17,059 84
	24,352 29

58 This measurement includes all former vouchers.

Proper credits to be applied for assessment. (See letters of July 3 and July 21, 1876, from this office, addressed to the auditor D. C.)

Total for assessment, ———.

I hereby certify that I have carefully examined the field-notes of D. E. McComb, leveler, who measured this work, and find the quantities correct.

The work is reported to be New Cut road.

Contract 561.

Nov. 4, 1876.

S. H. BODFISH,
Assistant Engineer.

Material furnished upon this or other contracts brought forward from voucher No. — value, ——— to ———.

Materials furnished since last report upon contract, see voucher No. 1263.

None furnished.

I certify that the foregoing is a correct account of material furnished, and that the prices charged are the net value of the material at the point where delivered, or in accordance with contract.

August 25th, 1876.

E. B. TOWNSEND,
Superintendent of Property.

I have carefully examined the account, and find the prices according to contract and the computations correct.

The amount due the contractor is to be ascertained by deducting from the above cost of the work the total advances unsettled, and also for ——— not previously charged, the sum of ———.

Nov'r 29, 1876.

B. OERTLY,
Assistant Engineer.

Approved, subject to future inspection of the work. (See letter transmittal, dated Dec. 14th, 1876.)

———, 187—.

R. L. HOXIE,
Lieut. Engineer U. S. A., and Engineer for D. C.

XXXVI.

The claimant has never received any payment on account of the work done and materials furnished on said New Cut road, except the said certificate of the Board of Audit for $22,182.92. The reasonable worth of the construction of a dry wall, such as was constructed by the claimant, was at that time $3.50 per cubic yard.

XXXVII.

A large part of the amounts paid to the claimant as aforesaid was paid in certificates or in 3.65 bonds. It appears that the claimant disposed of some of these at less than their face value. But it does not appear how many he so disposed of, nor what loss, if any, he suffered thereby.

CONCLUSIONS OF LAW.

On the foregoing facts the court decides as conclusions of law:

I. That the claimant is entitled to no allowance for the following items in his petition and his amended petition:

The claim for haul	$6,854 10
The claim for difference between Board rates and rates paid for masonry	1,370 08
The claim for coping as masonry	2,460 00
59 The earth excavation for retaining-walls	1,849 60
The alleged balance due on the Conduit road	325 67
The difference between the amount audited and the amount paid to the claimant	1,328 47
Excavation for lining of retaining-wall	2,000 00
The claim for loss on the sale of the certificates and bonds received by him from the defendants in payment for the work done under his contract	33,679 53

II. That the defendants are entitled to no allowance on account of the following items in the bill of particulars of their counter-claim:

Overpayment on account of stone masonry in canal wall	$20,459 15
Overpayment on account of coping	4,566 33
Overpayment on account of New Cut road	2,000 21

III. That the claimant is entitled to be allowed the following items in his petition to the several amounts set opposite each:

On account of 4,528 cubic yards of broken stone for drainage back of retaining-walls, at $1.25 per cubic yard	$5,660 00
On account of balance due for work on the New Cut road	3,268 38
Total	8,928 38

IV. That the defendant is entitled to allowance of the following items in their said bill of particulars, and to the following amounts:

Overpayment by mistake of fact for 15,185.82 cubic yards of grading on the Canal road, at 30 cents per cubic yard	$4,555 75
Overpayment by mistake of fact for 15,185.82 cubic yards of haul on said Canal road, at 24½ cents per cubic yard	3,720 52
Total	8,276 27

V. That the claimant is entitled to judgment for the difference between the amount allowed to the claimant and the amount allowed to the defendant, $652.11, as due and payable January 1, 1876.

VI. That contract No. 561 does not require to be reformed in order to conform to the understanding of the parties.

X.—*Opinion of the court.*

DAVIS, J., delivered the opinion of the court.

It is but simple justice to the counsel on both sides to say at the outset that the court has derived the greatest assistance from aheir able and full discussion of the complicated issues involved in this case, both in their briefs and in their oral arguments.

The items in the claimant's bill of particulars depend, in some measure, upon the force to be given to a contract known as contract No. 561.

In the autumn of 1871 the claimant offered to put the Canal road between Aqueduct and Chain Bridges in order. Apparently his terms were not acceptable, for no notice was taken of them.

A year later the Board ordered that a contract should be awarded him for this work, and directed that he be notified of its action.

An attempt was made to connect this act with the claimant's acts of the previous year; but the findings show no such connection, and in our opinion there was none.

The secretary of the Board at once wrote to the claimant, but instead of notifying him of the real doings of the Board, he notified him that a contract had been awarded him "at Board rates," which had not been alluded to by the Board in their action.

60 The claimant before commencing work saw the defendant's officers in relation to the work and the contract, but what took place can only be inferred from subsequent acts of both parties.

The claimant did work to the amount of a few thousand dollars in the autumn of 1872, for which he was paid in part. In the spring of 1873 he resumed work and continued at it until the autumn, when a final measurement was had of the work done to that time. For all this work he was paid at Board rates with two exceptions. 1st. He was paid for stone masonry at $5 per cubic yard, while the Board rate was $6.50 per perch 2d. He was paid nothing for haul. So far as we can gather from the findings, his bills were rendered at the rates at which they were paid, and the payments were received without any intimation that the amounts allowed were too small.

During the progress of the work the claimant had put macadam on the road by direction of one of the Board of Public Works. This was formally recognized as a part of his contract in November, 1873, and in December, 1873, the contract, No. 561, under which all the work was supposed to have been done, was formally executed.

The findings show that both parties intended to embody in this formal instrument, and supposed they had embodied in it, all the agreements under which the one had been doing work and the other had been paying money. The instrument was antedated for the purpose, as the findings further show, of making it operative during the whole period of the work.

The claimant now, however, makes two objections to this instrument:

In the first place it was signed on behalf of the Board of Public Works by Henry D. Cooke, Alexander R. Shepherd, and James A. Magruder. Cooke was a member of the Board in October, 1872, when the contract with the claimant was actually made, but he had ceased to be a member in December, 1873, when the formal evidence of it was actually signed. Shepherd and Magruder were members throughout. The total number of the Board was five. The claimant maintains that the instrument not having been signed by a majority of the Board is invalid.

It is unnecessary for us to decide whether he is correct in this contention, for the findings show that the claimant signed that paper for the purpose of showing what his own understanding of the contract was. If, notwithstanding the written instrument, the contract still rested in parol, the court could have no stronger evidence to show what the claimant in-

tended it to be. If, on the other hand, the written contract is valid, the practical result on the issues in this suit is the same.

In the second place, the claimant maintains that he engaged to do the work at Board rates; that when the written contract varied from Board rates by excluding haul, and paying masonry at only $5 a cubic yard, it was a variation made without his knowledge, and against the intent of both parties, and that these provisions of the contract having been inserted by mistake the court should reform the contract by restoring Board rates as the measure of compensation.

This theory rests for its support upon: 1st. The letter of the secretary informing the claimant that a contract had been awarded him at Board rates. 2d. The testimony of the claimant that he supposed the rates stated in the written instrument were Board rates.

We have already seen that the letter of the secretary was not justified or authorized by the action of the Board. The claimant's contention therefore rests mainly upon his own unsupported testimony. On the other hand, it is contradicted by his own consistent conduct, from
61 October, 1872, when he began work under the original contract, to January, 1876, when he finished under the last extension of the contract. During all this time he rendered accounts and received pay for masonry at $5, and for grading without claiming haul. We cannot shut our eyes to these practical acts of construction. We think that before he began work he must have known that the secretary had made a mistake. We are also of opinion that when he signed the contract, in December, 1873, he knew what its purport was, and that it expresses the agreement as he understood it.

Having disposed of this general question, we will take up the items of the claim and counter-claim in detail.

The claimant's bill of particulars consists of fourteen items, thirteen of which are in the original petition and one in the amended petition.

Four of these were abandoned at the trial, namely:

Stone excavation, 1,661.53 cubic yards of haul as above, at 20.62½ cents per cubic yard	342 60
114 cubic yards of masonry, at 5 per cubic yard (see Exhibits No. 7, 8, and 9)	570 00
Repairing road at above point	41 00
120 cubic yards of cobble-stone used by overseer of repairs, at 75 cents per cubic yard	90 00

The item "Balance due on Conduit road, $325.67," was amended at the trial, so as to make it a claim for a receiving basin, $71.25. We do not find this claim to be sustained. (Finding XXX.)

There was also a claim made in the original petition for $33,679.53 for difference between the face value of certificates and the cash price for the work. In view of previous decisions, this claim was not pressed, and it is unsupported by proof. (Finding XXXVII.)

There was also a claim set up in the original petition for $1,328.47 for difference between the amount audited to the claimant and the amount paid to him. We have disposed of this by Finding XVIII, which states in substance that it is not sustained by proof.

We will take up the remaining items in classified chronological order,

and consider them when pertinent to do so in connection with the counter-claims.

The following items stand by themselves and have no relation to the counter-claims:

33,232 cubic yards of haul 1,650 feet over 200 feet, at .01¼ cents per hundred feet,= 20.62½ cents per cubic yard.....	$6,854 10
913.39 cubic yards of stone masonry, audited at $5 per cubic yard, which should have been at $6.50, the Board rates, making a difference of (see certificate of B. D. Carpenter, engineer in charge, of date February 4, 1876, marked Exhibit No. 4)	1,370 08

These claims are for work done before December, 1873, and are founded upon the alleged mistake as to the rates. For the reasons already given they cannot be allowed. The claimant received his contract price both for haul and masonry, and has no just claim to any further compensation for either.

The next series of claims grows out of an extension of contract No. 561 so as to cover the construction of an expensive wall on the south side of the Canal road and the completion of that road as a first-class road. It was made by the Commissioners after the abolition of the Board of Public Works, and was a much more extensive contract than the original.

Under this extension the claimant now makes the following claims, which are set forth in his original petition:

62 492 cubic yards coping, which should have been measured as stone masonry, at $5 per cubic yard (see letter of petitioner of June 4, 1875, and answer of engineer thereto, of June 9, 1875, marked, respectively, Exhibits Nos. 5 and 6, and extension of contract before described)	$2,460 00
4,624 cubic yards of earth excavation necessary for foundation of retaining wall on Canal road, at 40 cents per cubic yard (see engineer's measurement, Exhibit No. 10).....	1,849 60
4,528 cubic yards of broken stone necessary for drainage back of retaining walls, at $4.50 per cubic yard (see voucher of engineer's estimate, dated January 26, 1876, voucher No. 1134, Exhibit No. 11).....	20,376 60

And the following in his amended petition:

5,000 yards excavation for the purpose of constructing the lining in the rear of the retaining walls, at 40 cents per cubic yard.....	$2,000 00

In this connection the defendant sets up the following items of counter-claim:

To overpayment, by mistake of fact, on account of stone masonry in canal wall in excess of amount required by contract, 4,091.83 cubic yards, at $5.....		$20,459 15
To overpayment on account of coping, amount paid in mistake of fact	$9,887 01	
Correct amount due..	5,320 68	
Excess overpaid.....		4,566 33

To overpayment, by mistake of fact, for grading:

Amount paid—		
For excavation	$9,665 40	
For haul	7,893 41	
	17,558 81	
Amount properly due	782 88	
Excess overpaid		$16,775 93

It will be observed that these claims and counter-claims relate to: 1st. The retaining wall; 2d. The foundation for it; 3d. The lining back of it for drainage; 4th. The coping on it; and, 5th. The grading of the road itself. We will consider them in that order.

1. THE WALL.—The claimant makes no demand on this account. The defendant asks judgment for a large sum for alleged overpayment. The facts are briefly these (Finding XXIX):

The wall was some 3 miles in length, and in some places as much as 10 feet high. In the very outset the claimant varied from the plans and specifications by constructing it wider than they called for. He gave his reasons for these changes to the assistant engineers of the District and to the Commissioners, and they assented to the change. From time to time, during the work, measurements were taken and returned to the chief engineer, and passed upon by him and payments made in accordance with them; and all these measurements included the variations thus made. The Commissioners knew of it, and the reasons for it, and consented to it; the assistant engineers knew of it, and the engineer-in-chief might have known of it if he had paid personal attention to it. There was no attempt at concealment or fraud. When the final payment was made, which is now sought to be recovered back, it was done with the knowledge of the Commissioners, and by personal direction of one of them, and with the knowledge and consent of Assistant Engineer Oertly, who was acting as chief in the absence of Mr. Hoxie. The ground of the defendant's claim for repayment is that the engineer-in-chief did not assent to the changes which involved the construction of 4,091.83 yards of masonry beyond his plans. We think this claim cannot be maintained.

63 The defendant further maintains that in any event there is an overmeasurement of 661 feet in this wall. In support of this contention it refers to a measurement made by McComb, on behalf of the defendant, which is found to be less by that amount than Franklin's measurement, on which the payment was made.

McComb's testimony was given January 24, 1882. On the 21st October, 1882, the defendant called Franklin as a witness, and made no inquiry of him on this point, although he did inquire as to other mistakes. Under these circumstances we cannot set aside Franklin's measurement and find a payment made under it to have been made in mistake of fact.

2d. THE FOUNDATION FOR THE WALL.—The terms of the contract must govern our decision. It required the claimant to "construct a stone retaining or parapet wall on the south side of the Little Falls road, between the Aqueduct and Chain Bridges, or at such points along said road as may be authorized by the Commissioners, at $5 per cubic yard. * * * The present

retaining walls to be removed to such depth from the top as may be directed, and the foundation inspected and approved by the engineer of the District of Columbia before relaying the wall, which is to be done in cement mortar."

A portion of the new wall was constructed in places where there was no old wall. It is admitted that the contract gives the claimant no claim for the labor in getting ready for the foundations in places where there was a previous wall. The claim is confined to excavation in places where there was no previous wall. The instrument extending the contract makes no other provision for payment except that already quoted. We are of opinion that it requires the claimant to do all the work necessary for the finished masonry at the agreed price of $5 unless there is something in the old instrument which gives him further pay for excavation.

Turning to that we find these provisions only, "Excavations and refilling, forty (40) cents per cubic yard, to be measured in excavation only," and "grading, thirty (30) cents for each and every cubic yard of earth, sand, or gravel excavated and hauled."

It is plain that the provision in regard to grading does not apply to this case. We think it equally clear that the other does not. This is not a case of excavation and refilling, like a sewer trench; and the rate of payment agreed upon for such double work is not applicable to this.

There being nothing in the old contract to control the plain language of the extension we must decide against the claimant on this item.

3d. THE LINING BACK OF THE WALL FOR DRAINAGE.—The specifications called for "a lining of coarse gravel twelve (12″) inches in thickness carried up in rear of the retaining wall," and the plans showed this in detail. There was no gravel along the line of the road, and it was mutually agreed, during the construction of the work, that macadam material should be substituted for the gravel.

The contract is silent as to the rate of pay for this work, which has been satisfactorily performed.

The defendant maintains that it was intended to be paid for by the price allowed for the masonry in the wall.

The claimant contends that he is entitled to compensation, 1st, for the labor in excavating the place for the reception of the lining at the rate allowed by the old contract for excavations and refilling; 2d, for the lining to be measured as masonry.

It is plain that this work of graveling in the rear of the wall, as contemplated by the contract, was a work of considerable labor and expense.

We cannot think that either party intended it to be paid for
64 in computing the masonry. In our opinion it is a casus omissus.
The parties have accidentally neglected to fix a price for this work.

The claimant has done the work; the District has received the benefit of it; and it only remains for the court to examine the findings and ascertain whether they furnish the means for fixing its value.

In Finding XXVI will be found the final measurement of the work done under this contract certified to by Mr. Bodfish, assistant engineer, and Mr. Oertly, assistant engineer for the lieutenant engineer. This measurement contains the following item: "4,528 cubic yards of broken stone filling at $1.25, $5,660, if allowed."

The item was not allowed at that time. The court allow' it now as the

measure of the amount of such filling, and of its value, and in full for the demands in the claimant's petition and amended petition, on account of such filling, and of the excavation for it.

4th. THE COPING ON THE WALL.—The contract called for a "coping to consist of selected stones six to ten inches thick, jointed; in length of not less than two feet, and must project over the parapet wall not less than two nor more than four inches on each side, and must be so disposed along the line of the wall that no two in juxtaposition shall vary in thickness nor in width more than three-quarters of an inch."

After laying about a thousand feet of this coping the claimant wrote to the Commissioners that it was expensive, arduous, and unsatisfactory work to make such coping, and made a proposition in the following language: "That I be allowed to use for the coping North River or other suitable coping stone, for which I will be allowed an extra compensation of forty (40) cents per foot. This stone will cost me, delivered on the ground, nearly (1) dollar per foot, but I am willing to bear more than one-half the expense, only asking the District government to assume the proportion I have named."

To this proposition Mr. Hoxie, on behalf of the District, made the following reply: "You are requested to call at this office to execute the necessary papers for an extension to your contract, No. 561, with the late Board of Public Works, to include the finishing of the parapet wall along the Little Falls road with the North River coping, at forty cents per lineal foot, payable in 3.65 bonds at par.

The claimant did not call and execute the proposed extension, but instead thereof went on with the proposed change, and the court is now called upon from this correspondence and the acts of the parties to decide what their agreements really were.

Assuming the average thickness of the coping called for by the contract to be 8 inches and its average width to be 30 inches, the contract price for it, viz, $5.00 per cubic yard, would amount to 30.8 cents per running foot.

The diminution in the size caused by using North River blue-stone, taking Hoxie's measurements in Finding XXVIII, reduced the contract price for it, measured as masonry, to about 15.4 cents per running foot.

As some compensation for this reduction, as well as the increased cost of the proposed change (estimated by the claimant at nearly $1.00 per foot), the claimant proposed that he should be allowed an extra compensation of 40 cents per foot.

He did not indicate whether he meant 40 cents per square foot or 40 cents per lineal foot. He now says that he intended square feet, and argues that the engineer must have so understood him, because any other construction would be inconsistent with the prices of blue-stone.

Lieutenant Hoxie's answer may be construed in two ways: 1st,
65 either as an acceptance of the claimant's proposition, defining the undefined term in it to be a lineal and not a square foot; or, 2d, as a counter proposal of 40 cents a running foot as the entire compensation. We think the first construction the one most consistent with the facts in the case, and the one which gives force to the whole correspondence. It is also the only one consistent with the action of Lieutenant Hoxie at a

subsequent stage, when he sanctioned a measurement of the work which contemplated an allowance to the claimant for the coping as masonry, and an additional payment by the foot. (Finding XXVIII.)

When the parties came to settle after the work was done both agreed that the claimant was entitled to be paid for the coping as masonry (which we have seen to be about 15.4 cents per running foot), and at as high a rate as 40 cents extra per lineal foot, or an aggregate of about 55.4 cents per running foot. The claimant contended that he was entitled to a gross allowance of 40 cents per square foot, which, allowing the coping to be 2 feet wide, would be 40 cents a running foot additional, or about 95.4 cents per running foot. The parties compromised by fixing upon a rate of 74½ cents a running foot. We cannot say that this payment was made in mistake of fact. We think that it was made and received as a settlement of a disputed item. Regarding it in this light, we can neither on the one hand set aside the payments already made to enable the defendant to recover on their counter-claim nor can we on the other hand award to the claimant the contract price for the coping as masonry, since the claim for it, however well founded it may have been originally, entered into the settlement by which both parties accepted a rate of compensation which neither contemplated when the work was done.

5th. THE GRADING OF THE ROAD.—The claimant demands nothing further for grading this road. The defendant asks to recover back $16,775.93, which it says was overpaid by mistake of fact for excavation and for haul in grading.

In the final measurement of the work by Mr. Oertly, in January, 1876, which is set forth in Finding XXVI, the claimant was allowed for 32,218 cubic yards of grading and for a similar amount of haul. The material in these two items was the same.

The defendants first contend that 15,185.82 cubic yards of this material was wrongfully allowed by mistake as grading and haul, because, they say, it was allowed and paid for as mcadam, and constituted a part of the 45.557.47 square yards of mcadam measured and allowed in the same measurement. The court has in Finding XXIX found this to be so.

The defendant further contends that 14,422 cubic yards of the grading and haul allowed in said measurement was in fact filling under the gutters, which by the extension of the contract was to be done without charge. As to this the court has found that it does not appear that there was any mistake of fact in that measurement.

The result is that the court allows the defendant for one payment by mistake of fact—

For 15,185.82 cubic yards grading, at 30 cents..	$4, 555 75
For 15,185.82 cubic yards haul, at 24½ cents.....	3, 720 53
	8, 276 28

The next items in consecutive order relate to what is known as the New Cut road, a road near to and connected with the Canal (or Little Falls) road, on which the claimant was at work in August, 1875.

66 It appears that this New Cut road was badly damaged by storms in that month. The three years' experience which the District authorities had had at that time with the claimant as a contractor appears to

have inspired confidence, and in the emergency Mr. Hoxie addressed the following letter, on the 31st August, to the claimant:

"You are authorized to repair the roads and culverts in the vicinity of the work now being performed by you along the Little Falls road which have been damaged by the late storms, as extra work under your contract No. 561 with the late Board of Public Works. You will present this order with your bill for the work, which will be done under the direction of Mr. Cunningham and Mr. Carroll, overseers."

No answer was made to this communication, but as the claimant at once went on with the work he must be presumed to have accepted the proposal.

In December he rendered an itemized bill, amounting in the aggregate to over $15,000, and asked for measurement and payment under his contract. This contract called for payment in cash. The defendant had no cash. Under direction of the Commissioners a bill was made out and certified to at rates which produced an aggregate that would make a payment in certificates equivalent to a payment of the bill rendered in cash, and the claimant was so paid in certificates.

We do not apprehend that there was anything immoral or intrinsically dishonest in this transaction. The parties assumed what was a manifest fact, that work to be paid for in depreciated securities was nominally worth higher rates than work to be paid for in cash. But the act was clearly illegal. The defendant having agreed to pay cash, was legally bound to pay cash; but when it found itself unable to do so, the law forbade it from parting with its securities to a creditor at less than par. It is too clear for argument that what it did was an attempt to do indirectly what the law forbade it to do directly, which a familiar rule of law makes an impossibility.

This payment in certificates to the amount of $22,182.92 must therefore be taken to be a cash payment to that amount on account of the work done on the New Cut road. It is the only payment that has been made on that account. Our labors in this respect are, therefore, now reduced to ascertaining the amount of the work done by the claimant on that road.

On the 14th December, 1876, Lieutenant Hoxie addressed to the Commissioners a letter in which he said: "I transmit herewith final measurement of work done on New Cut road by J. J. Shipman, under contract No. 561 of the late Board of Public Works, amounting to $24,352.29."

The measurements inclosed in this letter show the following apparent variations from contract rates: An allowance of $6.50 for masonry, and an allowance for haul. The counsel for the defendant ask us to strike these items from the measurement.

These measurements were made after the present controversy arose, and undoubtedly express Lieutenant Hoxie's well-considered judgment as to the claimant's rights. There may have been good reason for allowing the haul, and the masonry may have been of a different quality from the rubble cement, for which the contract fixes the price at $5. We are not disposed to assume the responsibility of changing these items.

Among the items included in this measurement were 1,090.8 perches of dry wall. The contract fixes no price for such labor and material. Lieutenant Hoxie estimates it to be worth $2.50 per perch, and allows that rate. The claimant contends that it is worth more than that, and introduced considerable proof to sustain his contention. We have reached

67 the conclusion that the rate allowed by Lieutenant Hoxie is below the prices paid for such wall at the time of its construction, and have found that it was worth $3.50 per perch instead of $2.50, as allowed.

As the result of this we disallow the counter-claim on account of the work on the New Cut road, and allow the claimant as follows:

Work done as by Hoxie's estimate	$24,352	50
1,098.8 perches dry wall, $1 per perch additional	1,098	80
	25,451	30
Less payments in certificates at par	22,182	92
	3,268	38

The judgment of the court is as follows:

The court orders, adjudges, and decrees that the contract between the claimant and the defendant referred to in claimant's petition as contract No. 561 correctly and truly sets forth the understanding and intention of the parties, and has not by accident, inadvertence, mistake, or clerical error failed to set forth the same, and ought not to be reformed.

And the court further orders, adjudges, and decrees that the claimant has established the following items of claim against the defendant set forth in his petition or the several amendments thereto, to wit:

A claim on account of 4,528 cubic yards of broken stone for drainage back of retaining walls, at $1.25 per cubic yard	$5,660	00
A claim on account of balance due for work on the New Cut road	3,268	38
Making a total of	8,928	38

And has failed to establish the residue of the claims set forth in said petition and amendments.

And the court further orders, adjudges, and decrees that the defendant has established the following items of counter-claim against the claimant, to wit:

Overpayment by mistake of fact for 15,185.82 cubic yards of grading on the Canal road, at 30 cents per cubic yard	$4,555	75
Overpayment by mistake of fact for 15,185.82 cubic yards of haul on said Canal road, at 24½ cents per cubic yard	3,720	52
Making a total of	8,276	27

And has failed to establish the residue of the counter-claims set forth in its bill of particulars.

And the court further orders, adjudges, and decrees that the claimant shall have and recover of the defendant the sum of $652.11, as due and payable on the 1st of January, 1876, being the difference between the said amount of claim allowed to the claimant and the said amount of counter-claim allowed to the defendant.

And the court further orders, adjudges, and decrees that except as to the said amount of claims so allowed to the claimant all the claims demanded in the claimant's petition and the amendments thereto be disal-

lowed, and the petition with reference to all the disallowed claims be dismissed.

And, further, that except as to the said amount of counter-claims so allowed to the defendant the defendant's counter-claims be dismissed.

68 XI.—*Final judgment of the court.*

At a Court of Claims, held in the city of Washington, on the second day of April, A. D. 1883, judgment was ordered to be entered as follows:

The court orders, adjudges, and decrees that the contract between the claimant and the defendant referred to in the claimant's petition as contract number 561 correctly and truly sets fort the understanding and intention of the parties, and has not by accident, inadvertence, mistake, or clerical error failed to set forth the same and ought not to be reformed. And the court further orders, adjudges, and decrees that the claimant has established the following items of claim against the defendant set forth in his petition or the several amendments thereto, to wit: A claim on account of 4,528 cubic yards of broken stone for drainage back of retaining walls, at $1.25 per cubic yard, $5,660.00; a claim on account of balance due for work on the New Cut road, $3,268.38, making a total of $8,928.38, and has failed to establish the residue of the claims set forth in said pe-

69 tition and amendments. And the court further orders, adjudges, and decrees that the defendant has established the following items of counter-claim against the claimant, to wit: Overpayment by mistake of fact for 15,185.82 cubic yards grading on the Canal road, at 30 cents per cubic yard, $4,555.75; overpayment by mistake of fact for 15,185.82 cubic yards of haul on said Canal road, at 24½ cents per cubic yard, $3,720.52, making a total of $8,276.27, and has failed to establish the residue of the counter-claim set forth in its bill of particulars. And the court further orders, adjudges, and decrees that the claimant shall have and recover of the defendant the sum of six hundred and fifty-two $\frac{11}{100}$ dollars as due and payable on the first of January, A. D. 1876, being the difference between the said amount of claim allowed to the claimant and the said amount of counter-claim allowed to the defendant. And the court further orders, adjudges, and decrees that, except as to the said amount of claims so allowed to the claimant, all the claims demanded in the claimant's petition and the amendments thereto be disallowed and the petition with reference to all the disallowed claims be dismissed.

70 And further, that, except as to the said amount of counter-claim so allowed to the defendant, the defendant's counter-claim be dismissed.

XII.—*Application for and allowance of appeal.*

And now comes the claimant and hereby takes an appeal from the judgment and decree rendered in this cause to the Supreme Court of the United States, and asks that the same may be allowed.

JOHN J. SHIPMAN,
By his attorney, W. WILLOUGHBY.

Filed May 3, 1883.
At chambers.
Allowed.

C. D. DRAKE,
Chief Justice.

71 In the Court of Claims.

JOHN J. SHIPMAN
vs.
THE DISTRICT OF COLUMBIA. } No. 122.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusions of law thereon, of the opinion of the court, of the final judgment of the court, of the application of claimant for allowance of appeal to the Supreme Court of the United States, and the allowance of same by Chief Justice Drake.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims at Washington City, this 4th day of June, 1883.

[SEAL.] JOHN RANDOLPH,
Asst. Clerk Ct. of Claims.

72 In the Court of Claims—December term, 1882.

JOHN J. SHIPMAN
vs.
THE DISTRICT OF COLUMBIA. } No. 122.

Cross-appeal filed by defendant, June 30, 1883.

From the judgment rendered in the above-entitled cause on the second day of April, 1883, in favor of the claimant, the defendant, by the Attorney-General, on the 30th day of June, 1883, makes application for and gives notice of an appeal to the Supreme Court of the United States.

THOMAS SIMONS,
Assistant Attorney-General.

Filed June 30, 1883.
At chambers.
Allowed.

C. D. DRAKE,
Chief Justice.

73 In the Court of Claims—December term, 1882.

JOHN J. SHIPMAN
versus
THE DISTRICT OF COLUMBIA. } No. 122.

I do hereby certify that the foregoing is a true transcript of the application for an appeal to the Supreme Court of the United States, filed by the defendant on the 30th day of June, A. D. 1883, from the judgment rendered by the said Court of Claims in the above-entitled cause on the second day of April, A. D. 1883, and that said appeal should form part of the record heretofore, to wit, on the fourth day of June, 1883, certified up to said Supreme Court.

In testimony whereof I have hereunto set my hand and affixed the seal

of said Court of Claims at Washington City this 6th day of October, A. D. 1883.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) No. 25. John J. Shipman, appellant, vs. The District of Columbia. Filed 22d August, 1883. No. 157. The District of Columbia, appellant, vs. John J. Shipman. Filed 12th October, 1883. Court of Claims.

119-148-704

FILED
OCT 16 1876
JAMES H. McKENNEY
CLERK

Supreme Court of the United States.

JOHN J. SHIPMAN, Appellant,

vs.

THE DISTRICT OF COLUMBIA, Appellee.

No. 25.

Points and Argument of Counsel for Appellant Shipman.

W. WILLOUGHBY,
Counsel for Appellant Shipman.

Supreme Court of the United States.

JOHN J. SHIPMAN, APPELLANT,

vs.

THE DISTRICT OF COLUMBIA, APPELLEE.

No. 25.

Points and Argument of Counsel for Appellant Shipman.

STATEMENT OF THE CASE.

This is an appeal from a judgment of the Court of Claims. Suit was brought by the appellant Shipman, under the act of Congress of March, 1880, authorizing certain suits to be brought against the District of Columbia, in the Court of Claims. The original petition set up twelve items amounting in all to $75,969.85 with interest—(p. p. 6 to 7.) An amended petition set up a claim for another item of $2,000; (p. 11.)

This original petition was filed Nov. 5, 1880 ; (p. 1.) The Attorney General filed a general traverse, Nov. 12, 1880, (p. 8,) ; a general plea of set off Jan'y 25, 1882, for $30,000 without setting forth particulars, (p. 9,) which was objected to because not filed in time, being after the close of the direct testimony, (p. 10,) and, December 14, 1882, more than two years after the filing of the original petition, filed bill of particulars of counter-claim of four items amounting to $43,801.62, (p. p. 10, 11.)

The Court disallowed all of the items of petitioner's claim except two, in part upon which the amount allowed was $8,928.38. and allowed two items of set-off amounting to

$8,276.27, making a balance due to Shipman of $652.11 as of January 1, 1876, (p. 68.)

Being concluded by the findings of fact as stated by the Court, the appellant submits to this Court only the following

ASSIGNMENTS OF ERROR.

1st. The court erred in disallowing the claim for haul set forth in the first item of the petition being for $6,854.10.

2nd. The court erred in disallowing the claim for masonry as set forth in the second item of the petition being for $1,370.08.

3rd. The court erred in disallowing the claim for coping as masonry.

4th. The court erred in disallowing the claim set forth in the 10th item, being for extra work under contract 561, amounting to $6,682.20.

5th. The court erred in allowing the two items of grade and haul of 15,185.82 cubic yards of grading to the District as overpayments to Shipman, amounting to $8,276.27.

CLAIM FOR HAUL.

This work was performed in the Fall of 1872 and in 1873, in pursuance of the following letter, dated October 5th, 1872, addressed to Shipman and signed by the Assistant Secretary of the Board of Public Works: "Sir, you have this day been awarded contract for repairing the canal road from the Aqueduct Bridge to the Chain Bridge *at Board Rates.*" (p. 13.)

The board rates for haul up to June 1, 1873, were one cent per yard for every 200 feet over the first 200 feet; after that time such rates were one and three-fourths cents for every one hundred feet over the first two hundred feet (p 18.)

The average haul over the first 200 feet was 1650 feet (p. 18.)

The finding does not show the portion of haul before the first of June, 1873, and that after that time, and we are com-

pelled to estimate such portion the best we can from what appears by the record.

It appears that less than one-fourth of the work was done in 1872 to wit, $4,740.77 (p. 14.)

The whole work in both years was $19,480.80 (p. 17.)

He did not commence work in 1873 until *after* May 7. (p. 16)

It would be liberal to the District to estimate the haul at 13,332 yards before June 1, 1873, and 20,000 yards afterwards and from the nature of the work it must be presumed that at least there would be an equal distance of haul after June 1, 1873.

At this rate the haul before June 1, 1873, would be 13,232

6th. The court erred in not allowing the price claimed for lining behind the wall.

7th. The court erred in disallowing the claims for excavation in rear of the retaining wall described in amended petition (p. 11).

completion of the work, [illegible]

without making such claim (p. 69.)

But it is a matter of which the court can take judicial knowledge that in public works of this kind and under such contracts the contractor does not render bills.

No such bills appear of record. The estimates and measurements are made up by the officers of the government themselves.

It will be noticed that there was no final payment on the estimate of this work until January, 1876, ten per cent being reserved and the receipt showing expressly that it was simply on account (p. 17.)

We respectfully submit that refraining from making a demand for the haul is not any reason whatever for the rejection of the claim if it be in fact well founded.

The court says, in its opinion, that the conduct of the claimant in making out his bill from 1872 to 1876 without making his claim is a practical act of construction against his claim.

But the truth is he made out no bill himself. He commenced work in October, 1872, but did very little that year receiving payment in January, 1874, about two years before he appears to have presented his claims, but in the mean time performing no act whatever of "practical construction."

The court, in its opinion, admits that Shipman testifies that he supposed the written instrument contained the Board rates, but the court reject this testimony because it is "unsupported." It is not impeached and there is nothing in in the findings to justify the court in ignoring it.

The statute expressly makes the testimony of the claimant proper evidence.

But the court say that the letter of the secretary was not justified by the action of the Board.

This letter expressly states upon its face that it is by order of the Board. (Finding 3, p. 13).

The Board ordered the notice to be given. (Finding 2, p. 13.)

It is signed by the duly authorized officer of the Board. Whether it were in fact authorized by the Board could not then effect the rights of this claimant. The apparent authority of an agent or officer within the scope of his duties is the real authority of such a case. Bronson's Executor vs. Chappell, 12 Wall. 683. N. Y. & N. H. R. R. Co., v. Schuyler 34 N. Y. 30. There is no question but that in all respects other than the haul and the masonry Shipman was doing the work at Board rates. There is nothing in the findings showing that Shipman had any knowledge of any other rates and no other rates were ever mentioned. No. paper purporting to show any different rates was signed by any party until after the completion of the work December

17, 1873, (pp. 19, 82), and this simply omits to mention any rates. The court nowhere in its findings states that the letter of the Assistant Secretary was not justified by the action of the Board, and the only foundation that can be suggested for the statement, in the opinion, is the fact that the entry on the journal mentioned in (finding 2 p. 13) does not specify Board rates.

But the journal entry is not the place to mention the various provisions of the contract and surely it is very unjust to suppose merely from such omission that the Assistant Secretary exceeded his authority in writing the letter he did, and upon the faith of which all the work in 1872 and 1873 was done by Shipman.

The court however attempts to justify its rejection upon ground that in December, 1873, after the work was all done, and after what was then supposed by the District to be a final measurement Shipman signed an instrument in which the blank relating to haul was unfilled (p. 29.) The court admits that this was not then a valid instrument for it was signed by only two members of the Board (p. 32). It is stated however that it was treated as such (p. 32) and was held to be evidence of what was the real contract (p. 69). The court say also that the parties *intended* to embody in this all of the agreements of the parties." It is not found as a fact that the parties *did in fact* embody all of the agreements but that they *intended* so to do. No doubt this is true and yet they have failed to actually do as they intended.

Consider the situation. The contract shown by the letter of the Secretary had then been *fully executed* by Shipman What was called a final measurement had been made.

Can it be supposed that Shipman then without any consideration whatever voluntarily gave up the sum of between 5000 and 6000 dollars then already earned ?

Would a voluntary relinquishment of such a sum without any consideration be binding upon him ? There is not a

suggestion of any reason why he should give it up. There was no claim that he should.

In reference to the lining back of the wall no price was fixed. The court say "In our opinion it was a *casus omissus*." The parties have accidentally neglected to fix a price for this work. The claimant has done the work, the District has received the benefit of it and it only remains for the court to examine the finding and ascertain whether they furnish the means for fixing its value" (p. 73.) Why is not this just as applicable to haul performed by Shipman ?

The writing referred to signed in December, 1873, itself recognizes that something is to be allowed for the haul (p. 22.) It provides that in the *allowance for hauling* the *length* of the haul over 200 feet, and the *amount* of material hauled will be determined on an average basis by the Chief Engineer of the Board of Public Works whose decision shall be final." There is no sense in this if nothing whatever is to be allowed for haul. In the same paragraph it provides for payment at Board rates for haul of materials *removed* and deposited. Shipman has done the work. The District has received the benefit of it. He did it in pursuance (as he supposed at least and had the right to suppose) of a written direction from the Board of Public Works specifying Board rates.

Other contractors doing similar work got pay for it at Board rates. Why should Shipman alone be required to lose this entirely ?

It must be apparent that the reasons given for allowing the District to enjoy the benefits of this work at the cost of Shipman and without any compensation for it are entirely insufficient.

CLAIM FOR MASONRY.

The Board rates for masonry were during the whole period $6.50 per perch, (p. 18), Shipman was allowed $5. He claimed the difference $1.50 on 915-20 yards making

$1,370.08. The court gives substantially the same reasons for disallowing this as were given in relation to the haul.

We submit that they are insufficient in view of the plain promise that he should be paid at board rates.

The Court is entirely at fault in speaking of Shipman's rendering accounts. These accounts are made up by the Engineers of the District as they show upon their face and as the court judicially know and as the writing signed December, 1873 specifically provides. There was a letter addressed to Shipman October 28, 1872 in reference to the construction of a culvert in which are mentioned 83 yards and 142 yards at $5 per yard.

But this would only apply to that number of yards-225. As to the rest there is nothing to show that he was to have less than Board rates.

There is nothing in the finding to show that this culvert was constructed or formed any part of the work performed by him. It is not mentioned in the written instrument signed in December, 1873.

We contend that the contract as shown by the letter of the Secretary, (p. 13) should be carried out for substantially the same reasons as those we have given for the claim of haul.

The mere *ex parte* declaration of Carpenter on (p. 15) can have no force as evidence.

The court, in its opinion, (p. 70) admits that Shipman testified that he did not know what the Board rates were. This accounts for his acquiescence in receiving pay at $5, but upon ascertaining that such rates were $6.50 he is clearly entitled to such compensation in view of the letter to him upon which he acted of October 5, 1872 (p. 13).

COPING.

The Court in their finding (p. 59) say that there was a controversy as to whether the coping was to be paid for

by the square foot or lineal foot. It also states that Shipman had a claim for payment of the coping as masonry. But as to this there was no controversy. It is further found that there was finally a settlement upon the rate set forth in the estimate. Upon looking at the rate in the estimate (p. 53) it is paid at the rate of 74-4 per foot.

Now this finding is somewhat ambiguous as to whether anything more was settled than the matter which was in controversy ; to wit the rate per foot leaving the claim for payment *as masonry* still undetermined.

We think that we are entitled to the construction so far as the finding is concerned that nothing was settled but the matter in controversy.

The finding is in the nature of a special verdict and to do away with what otherwise would be a very plain claim the finding should be precise and unambiguous and should clearly justify the exclusion of such claim.

There can be no question that Shipman was entitled to payment of coping as masonry and at least .40 per lineal foot *extra*. The only controversy was as to whether the .40 extra was for each square or lineal foot. (See pp. 41-42.)

It is true that, *in the opinion*, it is argued that the claim for payment, as masonry, was embraced in the settlement and should be rejected. But we are entitled so have the case heard upon the finding alone with out reference to the opinion. If the opinion be considered as an argument and not as a part of the finding, we think that such argument is fallacious.

In the first place it is argued that the diminution in size caused by the North River Coping reduced the contract price for it as masonry, and that the proposition of Shipman to be allowed .40 extra was *as a compensation for this reduction.*

Yet this proposition, upon which the argument is based, is a manifest error, for no one can see that a reduction in

size would cause a reduction in contract price per yard as masonry.

There was not, nor could be any reason for compensation upon this ground.

Again, by taking Hoxie's measurement, (p. 58) from which the Court argue, it would take a small fraction over 32 lineal feet as constructed to make a cubic yard. This at 40 per lineal foot and $5.00 as masonry would make within a very few dollars of what was finally paid according to the estimate referred to on page 53.

The payment too was in bonds while the .40 extra was to be in cash, and therefore the allowance at such estimate is no compromise on the part of Shipman whatever.

His contention was that he should have been paid 40 by the *square* foot and as masonry, which would have made his whole claim for coping $15,622.52. It would have made too, if the coping were two feet in width, .80 per lineal foot *in cash*, or if it were .30 inches in width as assumed in the opinion (p. 74), then it would be $1.00 a lineal foot in cash.

Shipman says (p. 42), that this would cost nearly $1.00 per foot delivered on the ground.

The record shows that a very large quantity of this coping was received from the District, and he was charged at the rate of $1.25 per foot (p.p. 48, 51, 54). It is therefore evident that whatever settlement was made was payment of such coping at .74 per *lineal* foot in bonds.

Any other settlement would have been simply an entire surrender by Shipman of his claim, and nothing like a compromise whatever.

Again, considering this as a settlement in any view it was a part of the general settlement shown by the estimates in which it was found. But the Court have sought to ignore such settlement as to the grading, and have allowed to the District $8,276.27 to be taken from it. The receipt to the

voucher made up from this estimate is *in full settlement*, and if such settlement be ignored in part it should be altogether.

This coping is not mentioned as masonry in the estimate and it is our claim that as masonry it is not embraced therein and is not therefore settled.

But if it be embraced in such estimate as contended for in the opinion (not in the finding) then any compromise in reference to it should be regarded as in part founded upon the consideration for the payment of the grading as made and if the statement is ignored as to the grading it should be as to the coping also.

It is manifest that Hoxie the Engineer representing the Commissioners did not understand that any compromise had been made extinguishing the claim for coping as masonry for long after he makes his measurement allowing the payment both by the lineal foot and as masonry (p 58).

This finding that there was any settlement by agreement is also directly in the teeth of the pleadings on both sides. The counter claim is for the excess made by paying .74.4 over what is claimed to be the contract price at .40. It was not suggested by either party that any such settlement had been made both parties contending that none had been made both by their pleadings and printed arguments.

Extra Work on New Cut Road.

Shipman was authorized Aug. 31, 1875, to perform extra work *under contract No.* 561 on New Cut Road (p. 60).

On the 29th of December, 1875, he rendered a bill for work which he performed under this authority on the basis of actual cost in cash and twenty per cent. added (p. 61).

This bill was made upon a wrong theory and was not accepted. He then made out another bill at $22,182.92 on the basis of bonds (p. 62).

This was according to the express terms of the contract No. 561, which says "Payment for the work herein men-

tioned shall be made in the bonds issued by the sinking fund Commissioners" &c. (p. 88).

This is a good reason why the prices should have been fixed as they were at a higher rate.

This bill is certified to be correct by Townsend, Superintendent of Property, and by Oertly, Asst. Engineer. He says: "I have carefully examined the account and find the prices *according to contract* and the computations correct" (p. 64).

This is paid Jan. 10, 1876, "in *full settlement* of the above stated claim" (p. 63).

Now the Court of Claims finds the actual amount of work to have then been done amounted to $17,659.84 (pp. 65-66). This finding is expressly stated to be upon an *exparte* measurement made about six months afterwards and transmitted to the Commissioners Dec., 1876. This measurement is incompetent upon its face. It is certified to by one Bodfish, upon field notes and report of another party and is thus secondary. It says, "No measurement furnished" (p. 65).

There can be no reason why credence should be given to this last statement rather than that made at the time the voucher was presented and paid.

Such statement surely should not be held to justify the reopening of an account settled and paid eight years before the claim is made "which was agreed to by the three Commissioners and by Mr. Oertly, acting as assistant engineer in the absence of Mr. Hoxie, and paid in full by a certificate of the Board of Audit (p. 62).

The Court has no right to adopt this second measurement for another reason, and that is that the measurements should be by the Engineer of the District. Such measurement when made and payment and settlement ought to be binding upon the District as well as upon the claimant. See Kihlberg v. United States, 97 U. S. 398.

The Court, in its opinion, says that the "contract called for payment in cash."

There would be more force in such suggestion if there were an executory contract providing that this should be done and it should be sought to enforce such executory contract.

But it is to be borne in mind that this is an executed contract.

The law refuses to interfere in the case of an illegal contract if executed by parties *in pari delicto*, but leaves both parties as they were. (2 Parsons on Contracts, 2nd Ed., p. 254 and cases cited.)

There was not what can properly be called an overpayment. Shipman did not receive more in value than he would be entitled to on the basis of cash. If by this transaction the District suffers wrongfully the Commissioners and their sureties should be held responsible therefore but surely an action ought not to be sustained to recover of Shipman such alleged over payment commenced some seven or eight years after the transaction is finally closed. (See Hitchcock vs. Galveston, 96 U. S., 341.)

The Commissioners have made hundreds of contracts containing the provision that will be found in page 38 of this record in this contract 561, providing that payments shall be made in the District bonds.

The necessary effect of this is that the rates are higher than they would be if payments were made in cash and the result of such contracts is precisely what was done in this case, that the District by making payment in bonds incurs obligation to pay more than cash payments would be or in other words would make over payments such as alleged to have been made in this case.

The reasoning of the Court below would justify the recovery for over payments in all cases where payments have been made in accordance with such contracts.

The Commissioners have general powers to make contracts for certain purposes, to fix the rates of payment, to

make the payments, to adjust and compromise and settle in cases of indefinite claims, and it will be going beyond any reported cases to say that such a transaction is an overpayment which can be recovered back from the payee. See 1 Dillon on Mun. Corp., Sec. 478.

Thr receipt given is "in full settlement," which is binding upon Shipman in the absence of fraud or clear mistake of fact, not of law, and it ought to be binding upon the other party to that settlement as well.

The claim of overpayment is one that requires that facts should be found to sustain it. The finding is in the nature of a special verdict and must in all respects sustain the claim. It should then find positively (as it does not) that the measurement and computations according to the terms of the extension of contract No. 561 as stated in the certificates to the voucher are incorrect and would not produce the amount paid upon such certificates.

The finding is defective in this respect.

The reasoning of the Court is based upon the idea that the settlement was a *mistake of law.*

But this is not a sufficient reason for setting aside a compromise or settlement.

It can be done only upon a *mistake of fact.*

Lining behind the Wall.

The contract provided for a lining of coarse gravel behind the wall of twelve inches in thickness (p. 38). Afterwards broken stone was substituted in its place by consent of the District (pp. 60 and 61).

This amounted, at $1.25 per yard, to $5,690.50.

The reasoning of the Court for allowing this to this extent is now relied upon by the claimant.

If there be any doubt about the construction of the contract the surrounding circumstances may be considered (Noonan vs. Bradly, 9 Wall. 497). The finding of the

Court is conclusive as to the surrounding circumstances being such as to sustain its construction. See Bradly vs. W. A. and St. Packet Co, 13 Peters 89; 9 Clark & F. 566, 15 East. 501; 6 Peters 75; 1 Greenleaf's Ev. Secs. 298, 292, 293.

This lining is not a part of the wall itself. It is to be "carried up *in rear* of the retaining wall." It does not *necessarily* follow that this was to be done for nothing, and the surrounding circumstances to justify it, such as the extra expense which might have been very great, must be regarded as existing from the finding. Besides, this work was not in accordance with the contract, but was a variation from it by mutual agreement. See Dale vs. United States 14, Court of Claims, 372,514. Dermot vs. Jones, 2 Wall., p. 9.

But while the finding of the Court allowing pay for this lining should be sustained; the Court erred greatly in not allowing for it a fair price.

The material for this lining is precisely the same as the macadam put upon the road for which the *contract price* is $4,50 per cubic yard.

It is absurd that only a price of $1.25 should be allowed for it. It needs no finding of the Court to know that the work for putting in such lining would be at least equal to that of putting it upon the road. Of course the cost of procuring it and hauling it would be precisely the same.

The findings of the Court disclose sufficient data upon which this Court can remedy this plain injustice.

There can be no reason why the contract price for this material as used upon the road should not control the value of it when used as a lining behind the wall.

Excavation.

The finding (p. 59) states that the claimant has been paid nothing for excavating the foundation of the walls, or of the

place for the lining in their rear, stating also that the amount of such excavation is not satisfactorily shown.

It is true that the findings do not show the amount of excavation for the foundation of the walls, but there can be no controversy as to the amount required for the lining behind the walls. The amount of lining is stated at 4,528 cubic yards (p. 53), and there must for this have been at least so much excavation. The contract provides (p. 29) for "Excavations and refilling forty (40) cents per cubic yard to be measured in excavation only."

The Court, in its opinion (pp. 72–73), gives reasons for not allowing for excavation for the *foundation* of the wall, but says nothing about the excavation for the lining.

We respectfully submit that such reasoning is not sufficient for disallowing this claim. It *is* a case of excavation and refilling like a sewer trench. There can be no possible reason for making the distinction the Court attempts to make. This excavation had to be made, and there can be no reasonble suggestion why it should be done for nothing in the face of so plain a provision in the contract. This is the *natural common sense* construction and it requires a good deal of astuteness to make the forced distinction sought to be made by the Court.

The construction we contend for is that shown by the "practical construction" of the parties themselves.

In the final measurement the claimant was allowed for 224 cubic yards of excavation (p. 53), and this was renewed in the measurement made by Hoxie the engineer (p. 58).

Counter Claim of Overpayment for Grading.

As to the allowance to the District for overpayment for grading of $8,276.27 it is claimed—

First, That the claim therefore was not filed according to the rule 3 of the Court, which declares that pleas arising special defence, set-off or counter-claim must be filed with-

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First, That the claim therefore was not filed according to the rule 3 of the Court, which declares that pleas arising special defence, set-off or counter-claim must be filed with-

in one month after the claimant places his case on the notice book.

The petition was filed Nov. 5, 1880, but the plea of set-off was not filed until Feb. 3, 1882, which was objected to for that reason, and also, because the claimant had then completed his direct testimony (p. 10).

The bill of particulars was not filed until Dec. 14, 1882, more than two years after the filing of the petition.

Second, The finding is not sufficiently specific, as it does not state in what respect there was a mistake of fact.

Third, The grading was measured from time to time by the engineers of the District.

By the twelfth article of the contract (p. 30) it is provided that the measurements shall be made by the engineer of the District, and by the 26th paragraph (p. 26) it is provided that such engineer means the chief engineer of the Board and the assistant acting under him.

It does not appear that any mistake of fact or of measurement was made according to any measurement made by him, and it would be incompetent under the terms of the contract to find any such mistake, or that there was an erroneous measurement by any measurement except as made by such engineer.

In other words the measurement made by the engineer designated is binding upon all parties, and certainly could not be corrected except by the same engineer. Kihlberg vs. United States, 97 U. S.

In order to justify the setting aside of a measurement and settlement made in accordance therewith, which are conclusive upon both parties, unless impeached for mistake of fact, it should be stated precisely how such mistake occurred, what it was and that the correction was made, not by the remeasurement of some parties other than the desig-

nated party, but by such party himself. He is the only one who can by measurements or remeasurements determine the rights of either of the parties.

Counter Claims.

The counter claim for masonry is most effectively answered by the findings p. 59, and the opinion (p. 62), to which reference is made, in reply to any suggestions that may be made upon this appeal in behalf of the District.

It was claimed below, and may be here, that the Court erred in allowing the masonry at $6.50 and the haul appearing in measurements made by Hoxie on pages 65 and 66.

Aside from the reasons given by the Court it may be said there is no competent evidence or statement that payment of either of these was made.

The payment was upon the certificate and measurement appearing upon p. 62, and there is nothing to impeach the veracity of this certificate. The *exparte* measurement made by Hoxie a long time after the completion of the work and upon secondary statements has no legal force and was not followed by the Court in these, or in some other respects.

That the masonry, even according to Hoxie placed at $6.50, was different from some other masonry is shown by the fact that in his second statement he estimates certain masonry at $5.00 per yard (p. 66).

In the final estimate on p. 53 is found an allowance for haul of $7,893.41.

The Court disallowed of this $3,720.52 as applicable to macadam found to have been measured as grade and haul, but did not disallow the balance $4,172.89.

It was argued that because the claimant did not for two years claim haul that this was a practical construction of his contract that he was not entitled to it.

It would seem that the allowance of this haul by the District under what was claimed to be the same contract

and payment for it, is a practical construction by both parties that he was entitled to such haul.

Now there is no finding that as to the part not disallowed there was any *mistake of fact.*

There certainly was a claim for haul then made. The haul was worth, according to board rates, the sum allowed.

There was a settlement made of this claim at the rates mentioned and such settlement then was binding upon both parties. Such payment cannot be said to have been made under any *mistake of fact*, and it is therefore binding at least to the extent allowed.

W. WILLOUGHBY,
Counsel for Appellant Shipman.

119-148-704

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Supreme Court of the United States.

JOHN J. SHIPMAN, Appellant,

vs.

THE DISTRICT OF COLUMBIA, Appellee.

No. 25.

Brief of John J. Shipman in Reply.

W. WILLOUGHBY,
Counsel for J. J. Shipman.

Supreme Court of the United States.

JOHN J. SHIPMAN, Appellant,

vs.

THE DISTRICT OF COLUMBIA, Appellee.

No. 25.

Brief of John J. Shipman in Reply.

I.

The first error assigned by the District of Columbia is the refusal to allow the District a claim of overpayment to Shipman on account of stone masonry in the wall.

The counsel in his brief (p. 17), omits to give the entire finding of the Court. The finding states further (p. 59): "The measurements, which were from time to time returned to the chief engineer, were accurate returns of the amount of masonry done at each return; and the wall was constructed as to the amount of masonry in the manner as shown in the measurement set forth in finding 26."

As will be seen (p. 54), partial measurements had been made from time to time, and certificates had from time been issued in payment to the amount, in all of $182,159.93, and other allowances were made so that upon final measurement there was paid only $23,655.43 (p. 55).

It will thus be seen that *during the progress of the work from time to time*, the attention of the engineer, as well as

The certificate of "L. H Bodfish, Assistant Engineer," is that the *quantities* were correct. The certificate of the Superintendent of Property is that the prices of material furnished are correct. The blank certificate unsigned relates simply to *prices and computations*, not to measurements. There is no requirement that such certificate should be made as a prerequisite to payment. If there were it is fully covered by the other certificates and the approval of the engineer, Oertly.

But even if payment were made without such certificate such payment would not authorize a court of law or equity to adjudge a re-payment without showing that in fact the prices and computations were incorrect, and this is not suggested as to the masonry.

Now this *exparte* written communication of the engineer, Hoxie, of April 15, 1878, a year and nearly three months after payment and full settlement, is without any force either as a legal document, or as evidence.

We agree that as to the question of *measurements* the decision of the proper engineer is final. Of course such decision should be, and was made in this case in 1876 upon a hearing of the parties. Then the contractor submitted his case, when the work was fresh in the minds of all. Then was submitted the question of payment for extra work upon the masonry; and then, all questions of this character were decided, and the power of the engineer as arbitrator was exhausted.

It is absurd that he should assume some years afterwards to make his *exparte* statement and that the contractor should be affected in any way by such statement.

The Court does not find this statement of Hoxie to be correct, or that any statements in are true, or that it has any legal force whatever (p. 56).

The statements of counsel (brief p. 17) then are not justified by the finding.

Counsel says that "the knowledge and consent of the Commissioners, *individually*, is not sufficient.

But the true construction of the finding is that the Commissioners approved it officially; the Court say that they and the engineer in charge consented to it, and approved of the reasons for doing it.

It was, undoubtedly, judged by the Commissioners and the engineer in charge, that it was *necessary* that the wall should be thicker in order to support the pressure that would come against it.

Counsel says that it is incumbent upon Shipman to show that the Board had knowledge of the *payment* of the excess. These payments were made from time to time upon partial measurements, and they must have been known. But a small part was paid upon the final measurement.

The finding of the Court—"That contract, No. 561, does not require to be reformed in order to conform to the understanding of the parties," has reference to the mended petition (p. 9) which relates solely to the question of haul in 1872 and 1873. The question whether the extra masonry should be paid for is not within the province of the engineer. The only question submitted to him as an arbiter is that of *measurement* and he does not substantially change the final estimate upon which payment was made in this respect.

On page 45 will be found the allowance of 11,258.14 yards of masonry, July 16, 1875, approved by both Oertly *and Hoxie* (p. 46). On page 48 will be found the allowance of 4,550 yards of masonry, September 24, 1875, approved by both Oertly *and Hoxie*, and on page 51 will be found the allowance of the whole amount, 21,739-2 yards. December 21, 1875, the same as in the final measurement and *approved by both Oertly and Hoxie* (p. 52).

II.

The next error complained of by the District is that the allowance for coping was at 74 4-10 cents per foot instead of .40 per foot.

The Court says (p. 59) that this was the result of a settlement of a controversy upon this point as to the price to be paid. This settlement ought to be conclusive as to this error.

The counsel gives as a reason for the claim that it should have been at .40, that it was certified according to the contract.

By this he means the statement of Hoxie, made April 15, 1878. There was no power given to Hoxie to determin by his certificate the *price* at which coping or anything else should be paid and especially to overrule any settlement of a controversy that had been made more than two years before between the Commissioners and the contractor.

If counsel gives so much force to this statement of Hoxie, why does he not allow us the item stated therein of this coping stated *as masonry* at $2,052.70? (p. 58.)

In former brief we have submitted to this settlement as to the *extra price*, but we have insisted, and do now insist that such settlement was limited only as to such *extra price*, and that the Court erred in not allowing the payment of coping besides *as masonry*. There has been no payment for it *as masonry* (p. 59).

We heartily concur in the authority quoted by counsel (brief, p. 20), that

"When parties have appointed an arbiter to *measure*, and have contracted that payments shall be made according to such *measurement*, they are bound by it."

We ask that *both* parties be held bound by it in all respects and that the Court will not countenance the proposition that when such arbiter has once made his decision and

settlement and payment has been made thereon, he can of his own motion, or at the suggestion of one of the parties, years afterwards, review his finding without giving the other party an opportunity to be heard.

III.

The third specification of error assigned by counsel for the District is based upon an assumed difference between the words "perch" and "cubic yard." Counsel assumes that the Court intended to fix the quantity at 1090.8 perches of dry wall, as stated in the unauthorized measurement of Hoxie, at p. 66.

Even if the Court were authorized to consider this as evidence as to the quantity it certainly did not intend to make a discrimination between the words "perch" and "cubic yard." In finding 36 it uses the words "cubic yard." In its opinion (p. 77), the Court say we have "found that it was worth $3.50 *per perch* instead of $2.50 as allowed."

The term "perch" does not appear anywhere except in this *exparte* statement of Hoxie. In the contract itself in the various estimates and elsewhere, the term used is "*cubic yard.*" Hoxie had allowed $2.50 *per perch.* It is manifest that the intent was simply to add one dollar *per perch* to this estimate of value. If there be any difference between perch and cubic yard it is a difference of technical terms of which the Court was not aware.

The definition of a perch by Webster is "In solid measure a mass 16½ feet each way." Of course this could not be meant by either Hoxie or the Court.

But we insist as in former brief that this unauthorized measurement of Hoxie of June 30th, 1876 (p. 66), so far as it contradicts the measurement of January 6, 1876 (p 62) is not entitled to any consideration whatever. The same may be said as to the estimate of May 10, found on page 65. The engineer designated by the contract had made

his measurement, and certified to its being correct, on January 6, 1876. His power as an arbiter was then fully exhausted, and both parties ought to be bound by it. The difference between the two estimates is entirely one of measurement. That Hoxie should be allowed to come in, several months afterwards, and without notice to Shipman, attempt to review the decision of Oertly, who was as fully authorized to act as he, is most plainly unjust. There is no authority to appeal from Oertly to Hoxie. We invoke the authorities in relation to the finality of the decision of an arbiter quoted by counsel for the District in support of our position. As to the measurement of Hoxie outside of the measurement of May 10th, and which is carried into the estimate of June 30th, either the whole of his estimate should be received as correct, and which would make the amount $7,292.45 performed after the payment of the first estimate on New Cut Road, or the whole amount with the addition of the increased price of dry wall fixed by the Commissioners should be allowed. The increase of price is to be governed by the finding of the Court, for the authority of the engineer, as to fixing amounts due, is limited to measurements and not to prices. This would make this work still unpaid for amount to $8,403.16 instead of the charge made by Shipman, or if the distinction sought to be made between "perch" and cubic yard should prevail it would be $289.26 less, if the calculations of counsel for the District in his brief be correct.

IV.

As to the lining behind the wall we desire to refer to former brief and to the opinion of the Court which seems to us conclusive.

The coensel urges the receipt of Shipman in full settlement of the voucher (p. 55) as a bar to the claim of lining.

There is nothing in the voucher, receipted, relating to the lining. Upon reference to the final measurement (p. 53) it will be seen that the decision in reference to the lining is expressly reserved. It is a memorandum, added after the amount showing the final measurement is made up, and only the $210,633.91 is carried into the receipted voucher. It is manifest that the claim of lining is not intended to be paid or satisfied. Whether it should be paid or not, is not a question of measurement, but purely a question of law to be subsequently considered.

Of course the exclusion of this item in his report of 1878 could have no bearing upon this question.

V.

As to the very satisfactory authorities of counsel for the District as to the finality of measurements made by the engineer and of settlements made thereon, we desire to urge them upon the Court in support of our position that the measurements in regard to the grading found in the final measurement should not be disturbed. This measurement was made and approved by the engineers of the District. The receipt which is urged upon us as a final settlement, and which would be final as to the grading, is also a settlement binding upon the District. Such decision by the appointed arbiter, followed by a final settlement thereon, cannot be set aside except upon principles applicable to arbitration and award. A mere mistake either of fact or of law would not be sufficient. The only mistake suggested is one of measurement. Even the arbitrator himself after having once announced his decision could not set up a mere mistake of measurement, and certainly such measurements could not be corrected by the measurement of other parties. The finding of the Court does not show such a mistake as would vitiate an award. If it did the contractor should not be bound by the award, nor by a settlement in pursuance of it if the award be set aside.

See Burchell v. Marsh, 17 How., 344.

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See Burchell v. Marsh, 17 How., 344.

VI.

In support of our position as to the binding effect of the letter of the Secretary of the Board of Public Works to Shipman in relation to payment at Board rates we desire to add the authority of Supervisors v. Schenck, 5th Wall. 772.

We also cite the same authority as to the District being estopped from questioning the validity of the payment of the $22,182.92 for the work performed upon the New Cut Road as shown by the voucher on page 62.

The Court in this authority recognizes the distinction between executed and an executory contract which was made by us in former brief at page 14, and holding that in such cases a municipal corporation is estopped by the action of its officers to the same extent as in the case of transactions between private individuals.

W. WILLOUGHBY,
Counsel for J. J. Shipman.

119-148-104

Office Supreme Court U. S.
FILED.
OCT 25 1886
JAMES H. McKENNEY.
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1886.

JOHN J. SHIPMAN, APPELLANT,
vs.
THE DISTRICT OF COLUMBIA,
} No. 25.

and

THE DISTRICT OF COLUMBIA, APPELLANT,
vs.
JOHN J. SHIPMAN.
} No. 157.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR THE DISTRICT OF COLUMBIA—STATEMENT OF THE CASE.

In the Supreme Court of the United States.

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the 5th day of October, 1872, the board authorized the chief engineer of the District to prepare a contract with the claimant to put the road in good temporary repair for the winter. The same day the clerk of the Board notified the claimant of the action of the Board, but without authority stated it was at Board rates. The chief engineer of the District had an interview with the claimant, after which the work commenced on the 8th day of October, 1872.

On the 28th day of October, 1872, the clerk of the Board addressed a communication to the claimant, which was received by him, informing him that the chief engineer had been directed to amend his contract, No 561, dated October 8, 1872, by including certain additional work, and in the communication stated the price, according to the terms of the contract, No. 561. The claimant proceeded and did the work, for which he rendered his account, which, upon measurement was settled and paid for on the 9th day of January, 1874, according to the prices fixed in the contract. Contract No. 561, as set forth in finding No. 13, was not signed until about December, 1873, although it is dated the 8th day of October, 1872. But in all the correspondence with reference to the work done and to be done, both before and after that date, it was referred to and formed the basis of each account and settlement. This contract was intended to embody all the agreements of the parties with reference to the work on the roads.

Certain additional work became necessary, which had not been included in contract No. 561, and, on the 17th day of April, 1874, a written extension of the contract

was made between the Commissioners of the District and the claimant, as set forth in finding No. 22, fixing the price as in the original contract for such work as had been embraced in it and establishing the price for such as had not, and providing that the payment for the work should be made in 3.65 bonds at par. This last extension provided, among other things, for the stone retaining and parapet wall at $5 per cubic yard. On the 4th day of June, 1875, the claimant asked leave to substitute North River or other suitable coping stone at an extra compensation of 40 cents per foot, which, on the 19th day of the same month was consented to at 40 cents per *lineal foot*, payable in 3.65 bonds at par.

The claimant applied for final measurement of his work, which was made by B. Oertly, assistant engineer, on the 25th day of January, 1876, in the temporary absence of R. L. Hoxie, who had the work in charge. By this measurement and calculation the work was returned to the Commissioners of the District as amounting to $210,633.91, which, after deducting previous payments and credits, was paid and receipted for by claimant in full on the 27th day of January, 1876. By the contract, No. 561, it is provided "in the allowance for hauling, the length of haul over 200 feet, and the amount of material hauled, will be determined upon an average basis by the chief engineer of the Board of Public Works, whose decision shall be final; * * * and it is expressly agreed that no money shall become due and payable under this contract except upon the certificate of such engineer as hereinbefore provided." The settlement and payment by the Commissioners according to the measurements of Mr. Oertly, the

assistant engineer, was made upon an unsigned certificate of the engineer, approved by Mr. Oertly. The unsigned certificate is as follows:

> I have carefully examined the amount, and find the prices according to contract, and the computations correct. The amount due the contractor is to be ascertained by deducting from the above costs of the work the total advances unsettled, and also for ——— not previously charged the sum of———.
>
> ——— ———
>
> *Assistant Engineer.*
>
> 187-.

On the 15th day of April, 1878, R. L. Hoxie, the chief engineer, transmitted to the Commissioners a final estimate, with certificate in form, of the amount of work done by the claimant, and a computation of its value. To this final measurement and computation, B. Oertly, who had made the former measurement and computation, certified that the prices were according to the contract, and the computations correct. This certificate was full in form, and was approved by the chief engineer, Mr. Hoxie. By this computation the amount of $210,633.91, returned by Mr. Oertly on the 25th day of January, 1876, is reduced to $168,832.50. This discrepancy in the measurements is made as follows:

Grading allowed by Mr. Oertly..	$9, 665 40	
Grading allowed by Mr. Hoxie..	782 88	
Difference	.....	$8, 882 52
Coping allowed by Mr. Oertly...	$9, 887 01	
Coping allowed by Mr. Hoxie ...	7, 373 38	
Difference	.....	2, 513 63

32,218 cubic yards haul, at 24½, by Mr. Oertly		$7,893 41
21,739.2 cubic yards retaining wall allowed by Mr. Oertly, at $5 per yard	108,696 00	
17,286.83 cubic yards and bluestone coping allowed by Mr. Hoxie	86,184 15	
Difference		22,511 85
Aggregate difference of measurements		41,801 41

Of this discrepancy, $20,459.15 is accounted for by the fact found that the retaining wall was built thicker than the specifications in the contract authorized, by reason of which 4,091.83 cubic yards of masonary was used, and, as stated in the report of Mr. Hoxie in the twenty-eighth finding, was useless excess of masonry.

In August, 1875, damage had been done another road known as the New-Cut road, which the claimant was authorized to repair under his contract No. 561, as extra work. The claimant did the work under this extension of the contract, and, on the 29th day of December, 1875, rendered a bill to Chief Engineer Hoxie for settlement. This bill was not made out according to the contract, but purported to be a bill of actual costs, with 20 per cent. added for profit and was fully itemized.

This bill, on the 6th day of January, 1876, was, without any specification or reason assigned therefor, raised and stated in the aggregate at $22,182.92. It was certified to by Mr. Oertly, assistant engineer, on the 10th day of January, and paid in full at $22,182.92. On the 23d

day of February, 1876, the claimant rendered an additional bill for work on the same road, amounting to $6,682.20, on the same basis as his former. The work embraced in these last two bills was measured and computed by Mr. Hoxie, in conformity with contract No. 561, and the whole work, including both thus computed, amounted to $24,352.29. This result was also certified by Mr. Oertly, according to the contract, and correctly computed. In this computation the price of 1,090.08 perches of dry wall was credited at $2.50 per perch, there being no price provided in the contract No. 561 for dry wall. This credit, under the thirty-fourth finding, would be worth $3.50 per cubic yard, so that the value per perch would be about $3.25 instead of $2.50.

PETITION.

The claimant's petition purports to set out contract No. 561 and the extension thereof of the 17th day of April, 1875, as set forth in findings Nos. 13 and 22, with the following bill of particulars, together with the common counts:

33,232 cubic yards of haul, 1,650 feet over 200 feet, at 1¼ cents per 100 feet, = 20.62½ cents per cubic yard.....	$6,854	10
Stone excavation, 1,661.53 cubic yards of haul, as above, at 20.62½ cents per cubic yard...	342	60
913.39 cubic yards of stone masonry, audited at $5 per cubic yard, which should have been at $6.50, the Board rates, making a difference of.....	1,370	08
	8,566	78

See certificate of B. D. Carpenter, engineer in charge, of date February 4, 1876.

The following items not embraced within either audit aforesaid are for work and labor done and performed under the extension of contract aforesaid, and under the written orders and directions of the Commissioners of the said District and actual superintendence of the engineers of the said District, and to the satisfaction and acceptance of the Commissioners of the said District, to wit:

492 cubic yards coping, which should have been measured as stone masonry, at $5 per cubic yard	$2,460 00
(See letter of petitioner of June 4, 1875, and answer of engineer thereto of June 9, 1875, marked, respectively, Exhibits Nos. 5 and 6, and extension of contract before described.)	
114 cubic yards of masonry, at $5 per cubic yard (see Exhibits 7, 8, and 9)	570 00
Repairing road at above point.	41 00
4,624 cubic yards of earth excavation necessary for foundation of retaining wall on canal road, at 40 cents per cubic yard.....	1,849 60
(See engineer's measurement, Exhibit No. 10.)	
4,528 cubic yards of broken stone necessary for drainage back of retaining walls, at $4.50 per cubic yard (see voucher of engineer's estimate, dated January 26, 1876, voucher No. 1134, Exhibit No. 11)	20,376 60
Balance due on Conduit road. This is for the difference between Board rates and the price actually received.....	325 67
Extra work under contract No. 561, as per order of R. L. Hoxie, engineer in charge, as per pay-rolls and vouchers furnished as per extra work (see Exhibit No. 12).....	6,682 20

120 cubic yards of cobble-stone used by overseer of repairs, at 75 cents per cubic yard, $90.

All the work performed and materials furnished above described were under aforesaid contracts, and the written orders and directions aforesaid, and were accepted by the Board of Public Works and the Commissioners of the said District, for the uses and benefits of the said District of Columbia, and prior to the 14th day of March, 1876.

The aggregate amount so claimed upon the work above described, and which has not been audited or paid, is $40,961.85.

The petitioner further says that the amount of $22,595.75, audited by the Auditor of the Board of Public Works, as appears at page 421 of the report of the Commissioners of 1876 aforesaid, there has never been paid to him but the sum of $21,267.28, leaving still due him on account of the amount so audited the sum of 1,328.47, making unpaid the sum of $42,290.32.

Traverse, filed November 12, 1880.

And now comes the Attorney-General, on behalf of the District of Columbia, and, answering the petition of the claimant herein, denies each and every allegation therein contained, and asks for judgment that the petition be dismissed.

On the 10th day of May, 1881, in pursuance of leave, the claimant filed an amended petition, asking leave to reform the written agreement set forth in his original petition, in consequence of accident, inadvertence, mistake, or clerical error in the writing thereof, so as to include payment for the haul of earth, sand, and gravel and other material at Board rates.

On the 25th day of January, 1882, the respondent filed a further plea of set-off, with the following bill of particulars of counter-claim:

Bill of particulars of counter-claim, filed December 14, 1882.

To overpayment by mistake of fact on account of stone masonry in canal wall in excess of amount required by contract, 4,091.83 cubic yards, at $5		$20,459 15
To overpayment on account coping, amount paid in mistake of fact	$9,887 01	
Correct amount due	5,320 68	
Excess overpaid		4,566 33
Overpayment by mistake of fact for grading: Amount paid—		
For excavation	$9,665 40	
For haul	7,893 41	
	17,588 81	
Amount properly due	782 88	
Excess overpaid		16,775 93
To overpayment on account of work on New Cut Road by mistake:		
Amount of work done	$20,182 71	
Amount of payments on account	22,182 92	
Excess overpaid		2,000 21
Total		43,801 62

FINDINGS OF FACT.

Thirty-seven findings of fact were made by the court, which will be presented in connection with the particular errors to which they apply.

FINDINGS AND CONCLUSIONS OF LAW.

On the foregoing facts the court decides as conclusions of law:

I.

That the claimant is entitled to no allowance for the following items in his petition and amended petition:

The claim for haul	$6,854 10
The claim for difference between Board rates and rates paid for masonry	1,370 08
The claim for coping as masonry	2,460 00
The earth excavation for retainingwalls	1,849 60
The alleged balance due on the Conduit road	325 67
The difference between the amount audited and the amount paid to the claimant	1,328 47
Excavation for lining of retaining wall	2,000 00
The claim for loss on the sale of the certificates and bonds received by him from the defendants in payment for the work done under his contract	33,679 53

II.

That the defendants are entitled to no allowance on account of the following items in the bill of particulars of their counter-claim:

Overpayment on account of stone masonry in canal wall	$20,459 15
Overpayment on account of coping	4,566 33
Overpayment on account of New Cut road	2,000 21

III.

That the claimant is entitled to be allowed the following items in his petition to the several amounts set opposite each:

On account of 4,528 cubic yards of broken stone for drainage back of retaining walls, at $1.25 per cubic yard	$5,660 00
On account of balance due for work on the New Cut road	3,268 38
Total	8,928 38

IV.

The defendant is entitled to allowance of the following items in their said bill of particulars, and to thefollowing amounts:

Overpayment by mistake of fact for 15,185.82 cubic yards of grading on the Canal road, at 30 cents per cubic yard	$4,555 75
Overpayment by mistake of fact for 15,185.82 cubic yards of haul on said Canal road, at 24½ cents per cubic yard	3,720 52
Total	8,276 27

V.

The claimant is entitled to judgment for the difference between the amount allowed to the claimant and the amount allowed to the defendant, $652.11, as due and payable Jannary 1, 1876.

VI.

That contract No. 561 does not require to be reformed in order to conform to the understanding of the parties.

JUDGMENT.

The court rendered judgment in favor of the claimant for $652.11.

APPEALS.

From this judgment both parties appealed.

SPECIFICATION OF ERRORS.

1. The court erred in its second conclusion of law, which is "that the defendants are entitled to no allowance on account of the following items in the bill of particulars of their counter-claim:

Overpayment on account of stone masonry in canal wall	$20,459 15
Overpayment on account of coping	4,566 33
Overpayment on account of New Cut road	2,000 21

2. The court erred in its third conclusion of law, which is "that the claimant is entitled to be allowed the following items in his petition to the several amounts set opposite each:

On account of 4,528 cubic yards of broken stone for drainage back of retaining walls, at $1.25 per cubic yard	$5,660 00
On account of balance due for work on the New Cut road	3,268 38
Total	8,928 38

3. The court erred in its fifth conclusion of law, which is "that the claimant is entitled to judgment for the difference between the amount allowed to the claimant and the amount allowed to the defendant, $652.11, as due and payable January 1, 1876."

4. The court erred in entering judgment in favor of the claimant and against the respondent for $652.11.

5. The court erred in not entering judgment against the claimant, and in favor of the respondent for $30,322.63.

BRIEF OF ARGUMENT.

Before entering upon the discussion of the several specific errors assigned, it may be well to suggest such general facts as seem pertinent for consideration in the limitation and definition of the whole case. Contract No. 561, being the thirteenth finding (Rec., pp. 19, 28, inclusive), pervades the whole case as a controlling fact. It, with its extensions under the findings of fact, with the single exception of one item—the dry wall—furnishes the prices, the mode of measurement, the items to be allowed, and the final mode of computation and settlement. That the all-pervading power of this contract may not pass unobserved, attention is called to the claimant's bill of particulars (Rec., p. 6), which states:

> "All the work performed and materials furnished above described were under aforesaid contracts."

(Referring to contract No. 561 and extensions of same, as set forth in findings Nos. 13 and 22.)

It is referred to by number as 561 in finding No. 5 (Rec., p. 14); finding 7 (Rec., p. 19), claimant calling it

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Overpayment on account of coping	4,566 33
Overpayment on account of New Cut road	2,000 21

2. The court erred in its third conclusion of law, which is "that the claimant is entitled to be allowed the following items in his petition to the several amounts set opposite each:

On account of 4,528 cubic yards of broken stone for drainage back of retaining walls, at $1.25 per cubic yard	$5,660 00
On account of balance due for work on the New Cut road	3,268 38
Total	8,928 38

3. The court erred in its fifth conclusion of law, which is "that the claimant is entitled to judgment for the difference between the amount allowed to the claimant and the amount allowed to the defendant, $652.11, as due and payable January 1, 1876."

4. The court erred in entering judgment in favor of the claimant and against the respondent for $652.11.

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(Referring to contract No. 561 and extensions of same, as set forth in findings Nos. 13 and 22.)

It is referred to by number as 561 in finding No. 5 (Rec., p. 14); finding 7 (Rec., p. 19), claimant calling it

"my contract." It is embodied in the audit and settlement, both in its terms and by number in finding No. 9 (Rec., p. 17); by request of claimant it is amended so as to embrace macadam work in finding No. 12 (Rec., pp. 18 and 19). It is set forth in full in finding No. 13 (Rec., pp. 19 and 20). In finding 15 it is referred to by number (Rec., pp. 22, 33). It is referred to by number also in finding No. 17 (Rec., pp. 34 and 35). In finding No. 22 (Rec., pp. 37 to 39) it is extended to additional work. By finding 23 (3) (Rec., p. 41), it is extended to retaining parapet walls. Every audit, settlement, and communication between the parties refers to and assumes it as a basis. When the New Cut road was to be repaired, it was referred to and adopted by the parties as their contract for that work, as shown by findings 31 and 32 (Rec., pp. 60 and 61).

Finding No. 30 (Rec., p. 60) declares that no work was done or material furnished for the Conduit road. The subjects of contention are, therefore, confined to the two roads, the one leading from the Aqueduct Bridge to the Chain Bridge, the other the New Cut road. The previous references to the findings of fact show that these come within the provisions of contract No. 561. The sixth conclusion of law determines that the contract, No. 561, does not require to be reformed in order to conform to the understanding of the parties. (Rec., p. 68.) Hence this contract, with its several extensions, treated as a unit, becomes the law to the parties in this case. It is, then, only necessary to apply it to the facts as found to reach a just result.

The first item in the first error assigned is the rejection of overpayment on account of stone masonry in the canal

wall, $20,459.15. The specification in the extension of the contract, finding No. 22 (Rec., p. 38), provides:

> The thickness is to be four-tenths of its height.

By the same contract, on the same page, it is provided:

> It is further agreed that all work contemplated by this agreement shall be performed in strict accordance with the specifications hereunto annexed.

The contract, thirteenth finding (Rec., p. 30), declares:

> (12) It is further agreed that the measurements shall be made by the chief engineer of the party of the first part, or his assistant.

The same contract, section 8 (Rec. p. 28), provides:

> And it is further agreed that partial payments shall be made by the duly authorized financial agent of the said party of the first part on the monthly estimates of the chief engineer of the Board of Public Works aforesaid, and that whenever the said chief engineer aforesaid shall certify, in writing, that the party of the second part has completely performed this contract on his part, and shall submit, with said certificate, his estimate of the amount due the party of the second part, then, within thirty (30) days, as hereinafter provided, the party of the second part shall be entitled to receive the full amount due under this contract, deducting therefrom all previous partial payments which may have been made as hereinafter mentioned.
>
> And it is further expressly agreed that no money shall become due and payable under this contract, except upon the certificate of said engineer, as hereinbefore provided; and the said party of the second part further agrees that he shall not be entitled to demand or receive payment for any portion of the aforesaid work, except in the manner set forth in this

agreement; and when each and all of the stipulations hereinbefore mentioned are complied with, and the engineer shall have given his certificate to that effect, a final settlement shall be made in writing between the parties, and the whole amount found due the party of the second part under this contract shall be paid to him, excepting such sum or sums as may be retained under any provision of this contract; provided that partial payments may be made, under direction of the said party of the first part, otherwise than upon the estimates of the said engineer, as provided above, if, in the opinion of the said party of the first part, the vigorous prosecution of the work will be promoted thereby.

The twenty-ninth finding (Rec., p. 59) states:

> The wall is not constructed in accordance with the specifications. It varies therefrom by reason of being thicker, and contains 4,091.83 cubic yards of masonry more than it would have contained if it had been constructed according to the specifications.

In the report of Mr. Hoxie, chief engineer, twenty-eighth finding (Rec., p. 56), he states:

> In the former account the contractor was allowed for a useless excess of masonry over the specifications of his contract and the instructions given him. The excess is wholly unnecessary, and the contractor was repeatedly warned by myself that he would not be paid for it. He persisted, however, in constructing the wall to suit himself, giving at one time as a reason for the increased dimensions of the parapet wall that it was cheaper for him to increase these dimensions in order to work in the stone as it came from the quarry.

The report, computations, and certificate in this finding were made in 1878; were full, regular, and in all re-

spects conformed to the contract. On the 27th of January, 1876, this excess of masonary had been paid for in full, as shown by the receipt of the complainant, set forth in finding No. 27 (Rec., p. 55). This payment was made on a measurement and estimates made by B. Oertly, assistant engineer, in which this excess was included, and upon an unexecuted and unsigned certificate as to the accuracy of the measurement or the correctness of the computation, as set forth in the 26th finding (Rec., pp. 53 and 54).

The twenty-ninth finding (Rec., p. 59) states:

> This variation was made with the knowledge and consent of the Commissioners and of the engineer in charge of the work, who approved of the reasons given for doing it, and it might at any time have been known to the chief engineer had he made inquiry or personal examination.

The statement in this finding does not justify or excuse its payment.

(1) The reason given as above set forth was that "it was cheaper to the contractor, in order to work in the stone as it came from the quarry."

(2) The variation was made by the contractor with notice from the chief engineer "that he would not be paid for it" (twenty-eighth finding, Rec., p. 36), as above set forth.

(3) The knowledge and consent of the Commissioners individually, when not acting as a board, by which a written contract made as a board, without evidence of any approving action by the board, would be insufficient in

law to revoke or change the contract or its terms. (*Vide Wachob and McDonnel* v. *School District of Bingham*, 8th Philadelphia, 568; *Turnpike Road* v. *Craver*, 45th Penna. State, 386; *School District of Dennison* v. *Pashaton*, 89th Penna. State, 395; *Hollinson* v. *Frankford*, 121 Mass., 214.)

(4) In order that the payment by the Board for the work should be construed as a ratification it would be incumbent on the claimant to show the Board had knowledge that the excess was included in the estimate paid. *Vide Owings* v. *Hall*, 9 *Peters*, 629; *Burrow* v. *O'Brien*, 4 *Russell*, 395. There is no direct evidence of such knowledge. The inference that as the estimate included it, therefore they knew, is rebutted by the fact, as shown by the estimate, that it was included in an aggregate in the following form:

21,739.2 cubic yards of retaining wall, at $5, $108,696.

(5) Such payment involved a change in the contract, which provided: "The work contemplated by this agreement shall be performed in strict accordance with the specifications hereunto annexed." The sixth finding of law (Rec., p. 68) rules "That contract No. 561 does not require to be reformed in order to conform to the understanding of the parties." Hence, to conform to the understanding of the parties, this item of $20,459.15 should have been excluded from the estimate; its payment was a mistake, and the refusal of the Court of Claims to allow it as a counter-claim was an error.

The second item in the first error assigned is $4,566.33 overpayment on account of coping. The material facts bearing upon this are:

By extension of contract No. 561, twenty-second finding (Rec., p. 38), the parapet wall with coping is provided for, and the price fixed at $5 per cubic yard for the whole work. This extension was modified as per finding No. 24 (Rec., pp. 41, 42), by a proposition in writing made by the claimant on the 4th day of June, 1875, in which he proposes "that he be allowed to use for the coping, North River or other suitable coping stone, for which he be allowed an extra compensation of 40 cents per foot." This proposition was accepted by the chief engineer on the 19th day of June, as follows:

> J. J. SHIPMAN:
>
> SIR: You are requested to call at this office to execute the necessary papers for an extension of your contract No. 561, with the late Board of Public Works to include the finishing of the parapet wall along the Little Falls road, with North River coping, at 40 cents per *lineal foot*, payable in 3.65 bonds at par.

The work was done under this modification of the contract. By the terms of the contract, the letter of the claimant and the response of the engineer, claimant was entitled to receive $5 per cubic yard, and 40 cents extra per lineal foot for the coping stone. By the uncertified computation of Mr. Oertly, finding No. 26 (Rec., p. 53), he is allowed for 13,289 running feet of coping-stone, at $74\frac{4}{10}$ cents per foot, $9,887.01.

By the regularly certified computation of Mr. Hoxie, the engineer, which was made upon the basis and according to the terms of the contract, as set forth in finding No. 28, the coping stone is as follows: $13{,}301\frac{7}{10}$ L. F. North River coping, at 40 cents, $5, 320.68—difference of computation, $4, 566.33.

It is maintained that the calculation by Mr. Hoxie is correct:

(1) On the ground that it is according to the contract.

(2) It is certified according to the contract.

(3) That, as the provisions of the eighth section of the contract (Rec., p. 28), establishes "that no money shall become due and payable under this contract, except upon the certificate of said engineer, as hereinbefore provided, and the said party of the second part further agrees that he shall not demand or receive payment for any portion of the aforesaid work except in the manner set forth in this agreement." Under this clause we maintain the certificate of the engineer is final.

> "When parties have appointed an arbiter to measure and have contracted that payments shall be made according to such measurement they are bound by it." (*Vide Herdic* v. *Belger*, 47 Penna. State Report, 60; *Reynolds* v. *Caldwell*, 51 Penna. State Report, 298.)

Hence the court erred in refusing the allowance of this item of the counter-claim of the respondent.

The third item in the first specification of error is overpayment on account of New Cut road, $2,000.21. This item may be properly disposed of in connection with the second item in the second assignment of errors, which was

allowed by the court as a charge against the respondent, which is:

On account of balance due on work on New Cut road, $3,268.38.

The extension for the New Cut road is embraced in an acceptance by the claimant of the terms proposed in the following letter:

ENGINEER'S OFFICE,
DISTRICT OF COLUMBIA,
Washington, D. C., May 31, 1875.

JOHN J. SHIPMAN,
City:

SIR: You are authorized to repair the roads and culverts in the vicinity of the work now being performed by you along the Little Falls road, which has been damaged by the late storms, as extra work under your contract No. 561 with the late Board of Public Works. You will present this order with your bill for your work, which will be done under the direction of Mr. Cunningham and Mr. Carroll, overseers.

Very respectfully,

R. L. HOXIE,
Lieut. Engineer U. S., Engineer of D. C.

Finding No. 31 (Rec., p. 60). The complainant did work under this contract, and rendered two accounts for it. The first, set forth in finding No. 32 (Rec., pp. 61 and 62), aggregated $15,084 39
The second, finding No. 34 (Rec., pp. 63 and 64)..... 6,682 20

Total of above accounts..... 21,616 59

The chief engineer measured and computed the same work according to the contract, as set forth in finding No.

35 (Rec., pp. 64, 65, and 66), by which the whole work was shown to amount to $24,352.29, showing the amount of the estimate of the engineer above bills rendered by complainant, $2,735.70. As the work was done under the terms of the contract No. 561, the estimate of the engineer, in accordance with the principle before stated, is conclusive on both parties, and the computation of the engineer must be accepted as final.

For the work on this road, the claimant was entitled to receive $24,352.29. By the receipt of the claimant, as set forth in finding No. 33 (Rec., p. 63), he did receive $22,182.92. Balance unpaid on this work by estimate of an engineer, $2,169.37. But in the computation of the engineer, 1,090.8 perches of dry wall is credited at but $2.50 per perch; whereas, by the thirty-sixth finding (Rec., p. 67), it is found to be worth $3.50 per cubic yard. Reducing the 1,090.8 perches to cubic yards, there would be 1,010½ cubic yards, which, at the value found by the court at $3.50, would show that the estimate of the engineer should be increased from $2,727 to $3,536.75, making a difference in favor of the claimant of $809.75; thus making the total credit which should be allowed claimant on account of the balance due on the New Cut road $2,979.12. The Court of Claims, in the second item of the second error, allowed a credit of $3,268.38. Subtract the true amount, $2,979.12, would leave the balance of $289.26 to be subtracted from the credit allowed by the court. To this extent the Court of Claims erred in the second item of the second error.

The first item in the second error which the Court of Claims found in favor of the claimant is:

On account of 4,528 cubic yards of broken stone

for drainage back of retaining wall, at $1.25 per cubic yard, $5,660.

This claim should not have been allowed. The facts with reference to this item are—

Contract No. 561, finding No. 22 (Rec., pp. 37, 38), provides for the building of the parapet wall. (Specification 6, Rec., p. 38.):

> The stones must be laid in a good, workmanlike manner, well bonded; the interstices well and fully flushed with mortar and spawls, and a *lining of coarse gravel twelve inches* in thickness carried up on rear of the retaining wall.

Finding No. 29 (Rec., pp. 59, 60), states, "The specifications call for gravel as a lining at the back of the retaining wall. There being no gravel near the line of the road, at the claimant's request broken stone was substituted, with the defendant's consent. The claimant has not been paid for this lining otherwise than as the same may be held to be included in the contract price for the wall."

The above include all the facts with reference to this claim. From these facts it appears that gravel lining was provided for in the price of the wall at $5 per perch, which was paid; that to accommodate the claimant, in consequence of the great distance he would have to haul the gravel, at his own request he was permitted to substitute broken stone. It is nowhere claimed or found that the broken stone was better than the coarse gravel. There is certainly no fact from which the legal inference can rightly flow that the respondent should pay the claimant $5,660 for that which in no way benefited the respond-

ent, and which was an advantage only to the claimant. This item, although it was mentioned was in the computation of Mr. Oertly, finding No. 26 (Rec., 53), was not allowed. With this item excluded by finding No. 27 (Rec., 55), the complainant receipted and acknowledged settlement in full. In the official measurement and certification by Mr. Hoxie, finding No. 28 (Rec., 56), the item was excluded. Hence the conclusion of law by which the sum of $5,660 is found in favor of the claimant in the first item of the second error assigned is erroneous.

If the court concurs in the views expressed concerning the errors already discussed, or any of them, the sequence follows that the third and fourth errors assigned should be sustained. In support of the fifth error it is maintained that the Court of Claims should have reached the following conclusion:

The respondent should have been allowed the following items of its counter-claim:

Overpayment on account of stone masonry in canal wall	$20,459 15
Overpayment on account of coping	4,566 33
Overpayment by mistake of fact for 15,185.82 cubic yards of grading in the Canal road, at 30 cents per cubic yard, as per fourth conclusion of the Court of Claims	4,555 75
Overpayment by mistake of fact for 15,185.82 cubic yards of haul on said Canal road, at 24½ cents per cubic yard, as per fourth conclusion of the Court of Claims	3,720 52
Aggregate	33,301 75

Claimant should be credited with balance due for work on the New Cut road, as above described, being the second item in the third conclusion of the Court of Claims.....	$2, 979 12
Amount due respondent.....	30, 322 63

For which amount the Court of Claims should have rendered judgment in favor of the respondent, and in that it did not, it erred.

G. A. JENKS,
Solicitor-General.